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OVERSIGHT ON INTERNATIONAL COPYRIGHTS

HEARING

BEFORE THE

SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

HOW TO PROTECT THE NATION'S CREATIVITY BY PROTECTING THE VALUE OF INTELLECTUAL PROPERTY

SEPTEMBER 25, 1984

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OVERSIGHT ON INTERNATIONAL COPYRIGHTS

TUESDAY, SEPTEMBER 25, 1984

U.S. SENATE,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, in room SD–226, Dirksen Senate Office Building, commencing at 2:30 p.m., Senator Patrick J. Leahy (member of the subcommittee) presiding.

Staff present: Ralph Oman, chief counsel; Thomas Olson, counsel; Pamela S. Batstone, chief clerk (Subcommittee on Patents, Copyrights and Trademarks); John Podesta, minority chief counsel; B.D. Scotch, minority counsel (Subcommittee on Security and Terrorism); Renn M. Patch, counsel (Subcommittee on the Constitution); and Beverly E. McKittrick, counsel (Subcommittee on Criminal Law).

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. The meeting will come to order.

I am very pleased that in the frantic rush of the Senate to deal with the end-of-session agenda, with important things such as that of the continuing resolution, genocide treaty, and other matters of signal importance to the United States and the rest of the world, that we were able to take time to think about longer term concerns, such as how to protect the Nation's creativity by protecting the value of intellectual property.

I will put my full statement in the record, but I would like to note a couple of things.

The problem is vast.

The value of pirated tapes in the Middle East alone was $66 million in 1982. In Saudi Arabia it is almost impossible to find a recording that has been produced with the consent of the original producer.

The number of pirated copies of recordings in the Pacific Basin approaches 140 million units a year. Singapore is now considered to be the piracy capital of the world, and its government refuses to take an official stand against piracy.

I asked one of the government officials about that, having seen so many obviously pirated items on the street, and his answer was very blunt and to the point. "It makes money," and they have no intention of doing anything about it.

Developing and underdeveloped countries are not the only offenders. Almost 20,000 pirated videocassettes were seized in West Germany in just one quarter of last year, and similar problems

exist in Spain, Great Britain, the Netherlands, and France, and many other countries.

The occasion for today's hearing is a very thoughtful and provocative study of the entire problem of piracy and international copyright protection by the Copyright Office.

David Ladd, the U.S. Register of Copyrights, has brought to bear his own very considerable creative talent in putting this report together, and we owe him and his staff a great debt of thanks.

This study includes a specific agenda for the Congress, and I am certain this agenda will be a vital check list for this committee for years to come.

Your recommendations include bills to promote progress through trade agreements, the establishment of bilateral copyright relations with the States of the Pacific Basin and the Persian Gulf, possible U.S. adherence to the Berne Convention, modernization of both worldwide copyright conventions, and support for international and domestic copyright training programs.

In addition, you suggest ways to improve the protection of new types of intellectual property items, like satellite signals, and computer software.

I know, and you know, that no legislation will result from the report in this Congress, but the important thing is that we have the advantage during the time between Congresses to use the report to reflect on, and to prepare, and so we can hit the deck running next year.

So with that, I would much prefer to hear from you and your colleagues, and will place your full statement in the record.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

I am very pleased that in the frantic rush of the Senate to deal with the end-of-session agenda, we are able to take the time to think about an important longer-term concern: How to protect the Nation's creativity by protecting the value of intellectual property.

The problem is vast:

The value of pirated tapes in the Middle East alone was $66 million in 1982. In Saudi Arabia it is almost impossible to find a recording that has been produced with the consent of the original producer.

The number of pirated copies of recordings in the Pacific Basin approaches 140,000,000 units a year. Singapore is now considered the piracy capital of the world, and its government refuses to take an official stand against piracy.

Underdeveloped countries are not the only offenders. Almost 20,000 pirated videocassettes were seized in West Germany in just one quarter of last year, and similar problems exist in Spain, Great Britain, the Netherlands, France, and many other countries.

Book piracy is so entrenched in South Korea that Korean Publishers Association members actually oppose the concept of copyrights.

Even a Western, industrialized country like Canada pays no royalties for American Broadcasts transmitted via cable.

These developments make it clear that the piracy of books, records, and films threatens to debase the market value of the creative spirit throughout the world.

Some entrepreneurs, and more troubling, some nations have put momentary profits ahead of the world's desperate need for insight, imagination, training, health, productivity, and entertainment—the intellectual commodities that writers, composers, performers, teachers, researchers, and thinkers give us in their copyrighted works.

Even when they receive the benefits of adequate royalty payments, many of these people are not adequately compensated for their genius and devotion. In a complex world where the Tower of Babel has come to mean a world community not only sep-

arated by many different tongues but by the language of science and technology, our creative men and women are the difference between ignorance and enlightenment, fear and understanding, and perhaps even war and peace.

The same technology that offers so much potential for progress also makes copyright piracy easier than ever before in history. So much important copyrighted material is now on video or computer tape or on phonograph records that are easily taped. Even the reproduction of books has become easier with machines that can print, collate, bind, and cover an entire volume in seconds.

Radio and television come into our homes via satellite, but the signals don't respect international boundaries. In Vermont and other border states, broadcasters find that Canadian law does not provide a copyright royalty for distribution in that country via cable, and a recent study in Canada reveals considerable sentiment in favor of continuing this windfall.

I have introduced a bill to encourage Canada to recognize the rights of those who create television programs to have fair compensation for their use, and I know that we will discuss the prospects for this legislation a little later on.

But Canada's attitude is fairly symptomatic of a much wider problem—the unwillingness to pay for copyrighted works when inadequate sanctions are present in law or the international trade system to compel respect for creative rights.

Some underdeveloped countries correctly point out that they are often in no position to pay world market prices for information they need to promote social or economic progress within their borders. Thoughtful negotiation and innovative bilateral and multilateral understandings are the way out of this bind, not rampant piracy. Those third-world countries which flood their markets with pirated copies of works produced elsewhere are dealing their own creators a severe blow. Third-world composers, producers, and writers will not be able to compete with goods that cost little more than the tape or paper it takes to reproduce them, and the tragic result of piracy may be the long-term impoverishment of underdeveloped nations by the developed.

The occasion for today's hearing is a very thoughtful and provocative study of the entire problem of piracy and international copyright protection done by the Copyright office.

David Ladd, the United States Register of Copyrights, has brought to bear his own very considerable creative talent in putting this report together, and we owe him and his staff a great debt of thanks.

This study includes a specific agenda for the Congress, and I am certain this agenda will be a vital checklist for this Committee for years to come.

Your recommendations include bills to promote progress through trade agreements, the establishment of bilateral copyright relations with the states of the Pacific Basin and the Persian Gulf, possible United States adherence to the Berne convention, modernization of both worldwide copyright conventions, and support for international and domestic copyright training programs. In addition you suggest ways to improve the protection of new types of intellectual property items, like satellite signals and computer software.

In sum, this is a report that not only tells us what the problems are, but goads us to find the right solutions. We cannot overestimate its value.

Fortunately for us, works produced by our government are in the public domain, and we can freely use and quote from this valuable document without paying the Copyright Office a penny in royalties.

Mr. Ladd, much work lies ahead for you and I am delighted that you have been able to present your report before the 98th Congress ends, as a timely reminder that when the next Congress begins, the sense of urgency will be upon us from the start.

I thank you for being here, and I look forward to hearing your testimony.

STATEMENT OF HON. DAVID LADD, REGISTER OF COPYRIGHTS, LIBRARY OF CONGRESS, WASHINGTON, DC, ACCOMPANIED BY DAVID E. LEIBOWITZ AND LEWIS FLACKS, POLICY PLANNING ADVISORS TO THE REGISTER OF COPYRIGHTS, LIBRARY OF CONGRESS, WASHINGTON, DC

Mr. LADD. Thank you, Senator Leahy.

It is altogether fitting that you should preside at this meeting, because this report had its genesis in your interest in the field and subject matter and in your introducing S. 736. It was, as you recall.

at hearings on that bill that you suggested the possibility that such a report be prepared for the Congress.

I thank you for your comment about the report. Before I turn to my remarks, I would like to introduce Lewis Flacks, on my right, and David Leibowitz on my left, who are policy planning advisors in the Copyright Office, and who assisted in the preparation of this report.

The report deals comprehensively with problems throughout the world in securing adequate and effective protection for copyrighted works. It is a long report, but I hope its length will contribute to its usefulness.

The first part traces the history of the development of American international copyright relations.

Part two of the report discusses the condition of the copyright protection in various foreign markets, particularly with respect to piracy in those markets.

The third part surveys pending legislation in the Congress affecting copyright, particularly in international markets, and the final section details the Copyright Office's specific recommendations about how the Congress and the United States may move to secure American intellectual property in foreign markets.

As you would expect, in what we now call the postindustrial and information age, commerce in information products, which in large measure means copyrighted works, has grown in importance, both in domestic and international commerce, and it will continue to do so.

As this subcommittee knows from previous hearings, piracy is commonplace everywhere—not only in the Third World, not only in foreign markets, but in the United States as well. And by "piracy," we mean willful unauthorized copying of copyrighted material for commercial gain.

Because of this growth in the size and importance of the markets for copyrighted materials, large revenues, both within the United States and from abroad depend on them, and so does the employment of tens of thousands of Americans. To a large extent, our balance of payments is affected by the size of revenues which American copyrighted properties earn abroad.

I might say, Senator Leahy, that Senator Mathias some time ago commissioned the Copyright Office to conduct a census of the copyrighted industries in the United States in an effort to gauge their magnitude and significance. We are getting support from the Department of Commerce, which is doing most of the technical work. That report will be completed by the end of this year. The subcommittee may want that report updated from time to time so you can see what the magnitudes are of dollar earnings, and what the effect on balance of payments those earnings have.

Because of the piracy I have mentioned, the copyright industries have requested Congress and the Executive to take steps to protect copyrighted properties in foreign markets, and both Congress and the Executive have responded. Those responses are treated in the report.

I can mention notably, in addition to Singapore which you mentioned in your opening remarks, Korea and the Persian Gulf, as places of high prevalence of piracy. Even in countries where the

United States has copyright treaty relations through the UCC, those countries have moved unevenly in terms of actions taken to adapt copyright to the new technologies, including cable television, computer programs, commercial rentals, and home taping.

The central question which we have addressed in this report is, How can we move to promote adequate and effective protection of copyright in world markets? The central idea which we have presented is that the United States must do two things.

First, it must continue to work within the multilateral treaty organizations and try to accord new and revised—continually revised—meaning to the standard of adequate and effective protection, which is found in the UCC. As corollary to that, we need to continue the policy to which the United States has long adhered, of encouraging nations to regularize their copyright regulations with the United States and other nations on the basis of adhering to one or both of the international treaties.

Another central idea in the report is that where overall circumstances permit, the United States will find it necessary, as it already has, to use available trade leverage and bilateral arrangements to foster legal regimes abroad which secure rights in American copyrighted materials.

As an example, the Congress has passed CBI legislation which has already had some success in encouraging just treatment of American intellectual properties in the Caribbean Basin. Also, the Congress is now considering—and legislation has passed one House—whether to extend the system of GSP on the basis of a requirement that the countries who are beneficiaries of special tariff benefits specifically be required to protect American intellectual property adequately. In both of these cases it is really a matter of simple justice that countries whose nationals enjoy special benefits and special access to the American markets be required to provide rudimentary protection for American intellectual property.

It must be admitted that the search, which has begun and continues in Congress, and the Government generally, for unilateral courses of action to secure intellectual property in foreign markets shows some concern over whether the multilateral copyright organizations are up to the job. There is no doubt that the political contentions which have exercised the United Nations General Assembly have thrown a shadow over the multilateral copyright organizations. In recent years, Third World and copyright-importing countries have become a majority in both UCC and Berne. In the debates of both those two organizations there have appeared direct analogies to the debates which have occurred here before your subcommittee, between rights holders and users, with respect to the domestic copyright legislation. Whatever their shortcomings may be, international copyright organizations have established two important principles which have served the United States and other countries well: First, the principle of national treatment, that is, that signatory countries treat the authors of other countries as they treat their own, and, second, a standard of adequate and effective protection which, however vague, establishes the idea that there is an international standard and provides the opportunity for giving it fresh meaning in light of changed circumstances, by which I mean mostly changed technologies. We are far better off

now under the rights which flow to us under the UCC than under previous bilaterals in establishing the eligibility of our nationals for protection under foreign copyright regimes, and in determining which law governs those rights.

It also must be conceded that many nations have deliberately remained outside the multilateral agreements. In those cases it will be necessary for the United States to consider whether bilateral agreements can be forged with those countries, and whether or not regional arrangements as, for example, in the Persian Gulf and the Pacific Basin, may be possible. There are two other steps which, in our view, are indicated on the basis of the analysis and the report.

The first is that we must participate unilaterally and with the international organizations in training personnel in developing countries, both inside and outside the international copyrighted system. WIPO and UNESCO have long conducted these programs in various foreign countries, but the United States has not been a frequent participant. That should change. We do expect in the coming spring to receive trainees from the People's Republic of China, which is now moving to establish a copyright law, and I hope it will be possible for the United States then to participate in other such efforts in the future. This proposal for training is addressed in a bill now before the Senate.

At the same time, we must encourage American business on their own to establish and expand commercial copyright relations in developing countries in a manner appropriate to serve their markets and designed to foster indigenous authorship and copyright in those countries. The complaint heard in Singapore and elsewhere is that without piracy, the nationals of those countries cannot obtain the copyrighted materials that they need because the price is too high.

American companies are going to have to be aggressive in licensing their copyright properties abroad, and otherwise try to build copyright cultures and interests within those countries which can speak from within the countries for those interests.

Now, let me turn to Canada, which is a particular interest of yours. As I have said, it was the inquiry into the problem of the Canadian failure to accord compensation for retransmitted American television programming by cable which originally occasioned this report. Undeniably, there are levers available to the American Government to influence the Canadian Government to protect adequately retransmitted American signals. It would be possible, for example, under S. 736, to deny participation to the Canadian nationals for distribution of royalties collected from cable systems in the United States. It would be possible to increase duties on particular Canadian imports. It would be possible, and has been proposed to the Senate, to limit foreign ownership of U.S. cable systems. But each of these steps has hazards.

Some of them would invite retaliation. They might contribute to worsening of U.S. trade relations. More relevant, I think, we have seen on the basis of consultations with the Canadians in which the Copyright Office has directly participated that Canadians have listened carefully to our concerns on the treatment of our signals by Canadian cable systems. The new white paper which has been issued by Canada is significant because it seems to retreat from the

conclusion that U.S. copyright owners should not be compensated and opens the question up for fresh debate.

That development in the white paper is noteworthy. There are, at this time, ongoing discussions between the U.S. Government and the Canadian Government, looking toward integration of the regulatory schemes for our television communication systems. That, taken together with the recent change in Government, which is being interpreted by many commentators as foreshadowing an improvement in American-Canadian relations, indicates, I think, that there may very well be an ultimate outcome satisfactory to both the United States and Canada.

The international copyright issues are serious. They are enmeshed with formidable issues of national cultural identities, censorship, trade policies, and antagonisms in some parts of the world to the free market mechanisms upon which copyright in the United States depends.

As far as copyright is concerned, territoriality is being destroyed. The American market and international markets are becoming one. The Congress would be well advised in acting on any domestic legislation to take into account what effect that particular action would have on the welfare of U.S. intellectual properties in foreign markets.

The effort that we are undertaking is nothing less than an effort to establish a kind of international law or at least international standards. Because the undertaking is large, it will certainly take time, probably decades. But the beginning has already been made, and the interest of Congress in advancing this cause is, of course, most welcome.

Thank you, Mr. Chairman.

[The following report was received for the record:]

TO SECURE INTELLECTUAL PROPERTY RIGHTS IN WORLD COMMERCE

A Report to the

Subcommittee on Patents, Copyrights and Trademarks

of the

Committee on the Judiciary

of the

United States Senate

and to the

Subcommittee on Western Hemisphere Affairs

of the

Committee on Foreign Affairs

United States House of Representatives

From

The United States Copyright Office

September 21, 1984

TO SECURE INTELLECTUAL PROPERTY RIGHTS IN WORLD COMMERCE

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TABLE OF ABBREVIATED CITATIONS

TITLE	HEREINAFTER CITED AS
A. Bogsch, The Law of Copyright Under the Universal Convention (Bowker: 1964)	BOGSCH, UCC
C. Grant, The Home Video Revolution in Western Europe, Special Report No. 144. (The Economist Intelligence Unit, April, 1983)	ECONOMIST
The Caribbean Basin Economic Recovery Act, Pub. L. 98-67, 97 Stat. 369 (1983)	PUB. L. 98-67
Convention for the Protection of Producers of Phonograms Against Unauthorized Implication of their Phonograms, CLTW: Phonograms Convention	PHONOGRAMS CONVENTION
Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite, CLTW: Satellite Convention	SATELLITE CONVENTION
Copyright Laws and Treaties of the World, (UNESCO-WIPO)	CLTW
Discussion and Comments on the Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law. [Comm. Print: 1963], 89th Cong., 1st Sess.	COPYRIGHT REV. PT. 2
International Media Law: A monthly bulletin on rights, clearances and legal practice. Oyez Longman, London	MEDIA LAW
Kupferman and Foner, Universal Copyright Convention Analyzed	UCC ANALYZED
Ladas, The International Protection of Literary and Artistic Property (1938)	LADAS
Motion Picture Association of America	MPAA
Motion Picture Export Association	MPEA
MPAA, Worldwide Anti-Piracy Newsletter	APN
Record Industry Association of America	RIAA

40-324 0 - 85 - 2

TITLE	HEREINAFTER CITED AS
Records of the Conference for Revision of the Universal Copyright Convention, Paris, July 5-25, 1971	RECORDS (1971)
Records of the Intergovernmental Copyright Conference, Geneva, August 18 - September 6, 1952	RECORDS (1952)
The Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, July, 1961 [Comm. Print: 1961], 87th Cong., 1st Sess.	1961 REPORT
United Nations Educational, Scientific and Cultural Organization	UNESCO
Universal Copyright Convention	UCC
WIPO, Glossary of terms of the Law of Copyright and Neighboring Rights (Geneva, 1980)	WIPO GLOSSARY
WIPO, Guide to the Berne Convention	BERNE GUIDE
WIPO, Guide to the Rome Convention and to the Phonograms Convention (1981)	ROME GUIDE
World Intellectual Property Organization	WIPO

TO SECURE INTELLECTUAL PROPERTY RIGHTS IN WORLD COMMERCE

INTRODUCTION

This Report deals comprehensively with problems encountered throughout the world in securing adequate and effective protection for copyrighted works. The premise appears frequently in this Report that securing such protection everywhere for authors and rights holders of all nations is in our particular national interest. Still there is in seeking that end a special self interest for the United States. As one would expect in the "post-industrial" Information Age, copyright-related commerce is vital and growing, not only in the traditional copyright industries of publishing, motion pictures, and sound recordings, but also in the computer-related, laser-carried, satellite-borne works protected by copyright. The revenues which that commerce generates, the employment it creates, the contribution to our international trade balances are crucial to the national welfare. And they will become more so.

Much of the industrial base which has historically supported American growth, prosperity, and power has migrated to foreign countries. Our highways are crowded with Japanese cars, our skyscrapers often erected with Korean steel, and our engines increasingly powered with Saudi oil. But the United States has an enviable position in the information (i.e., copyright) technologies and industries, and the United States can maintain it. But to do so, there must be not only in the United States, but throughout the world, adequate and effective protection against theft.

Our copyright industries today are probably losing over $1.5 billion in foreign earnings --- not to competition, not to sharp trading, but to plain theft on a grand scale. It is called piracy. Piracy means willful infringement of copyright for commercial gain. The principal victims -- because pirates most frequently steal the American works which the world likes -- are

United States authors and copyright holders, thousands of employees who derive their livelihoods from the copyright industries, and ultimately the United States itself. How to control that piracy, and otherwise to promote the rule of law and principled standards for copyright in world markets, is the inquiry of this Report.

This report originates in certain telecommunications conflicts between the United States and its neighbors, affecting copyright industries throughout the Western Hemisphere.

On March 19, 1983, Senator Patrick Leahy of Vermont introduced S.736, which sought "to redress the current imbalance in copyright protection afforded materials retransmitted by foreign cable systems." 1/ The principal "imbalance" arose out of differences between the domestic copyright law in the United States and in Canada: United States law accords copyright owners of motion pictures and other television programming a right to remuneration, but not of authorization, for the secondary transmission by cable systems of broadcast signals containing their works. In Canada, similar activities are exempt from copyright liability. Canadian copyright holders are consequently eligible to receive, and do in fact receive, royalties under United States law for retransmission by United States border cable systems of their works, while United States copyright holders receive no compensation for similar cable retransmission activities which occur in Canada. 2/

1/ Remarks of Senator Patrick Leahy, Congressional Record, March 9, 1983, at 2436. As Senator Leahy noted, "The copyright imbalance is but part of an overall pattern of policies concerning trade in telecommunications services which clearly puts United States citizens at a disadvantage. These policies are of particular concern to broadcasters along our northern border whose signals are picked up and retransmitted by Canadian cable systems." And, Senator Leahy added, "put quite plainly, the Canadian cable systems are content to get something for nothing." Id.

2/ Canadian law derives from the decision in Canadian Admiral Corp., Ltd. v. Rediffusion, Inc., Ltd. (1954) Ex. C. R. 382. By virtue of this holding,

During consideration of S. 736 by the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks, the compatibility of the bill with obligations assumed by the United States and Canada under the Universal Copyright Convention (UCC) was discussed, but not resolved.

At the time S.736 was being considered, other copyright problems which United States nationals encountered abroad were elsewhere being called to the attention of Congress, particularly the House Foreign Affairs Subcommittees on Western Hemisphere Affairs, chaired by Congressman Michael D. Barnes. The growing use of space satellites to distribute television transmissions for domestic consumption has had the unintended effect of making the copyrighted programming comprising these transmissions available to unauthorized users in the Caribbean and Latin America. In geographically contiguous areas -- all within the "footprint" of United States satellite signals, but outside of intended, paying markets -- copyrighted programming was being intercepted and exploited without permission or remuneration. In its report on the International Security and Development Cooperation Act of 1983, the House Committee on Foreign Affairs expressed its concern over these activities. 3/

Canadian copyright specialists have concluded that "under the current Canadian law, the simultaneous rediffusion by cable of broadcast signals is not protected by copyright as it is not 'broadcasting,' 'radiocommunication,' or a 'public performance.' In fact, Canadian cable systems do not presently pay copyright royalties for the simultaneous rediffusion of broadcast signals to subscribers." Keyes, A.A. and Brunet, C., Copyright in Canada: Proposals for a Revision of the Law 130 (April, 1977), Consumer and Corporate Affairs. For discussion of the most recent expression of the official Canadian position on cable-copyright policy, see, infra, at 161.

3/ A proposed amendment to H.R. 2992 to authorize appropriations under the International Security and Development Cooperation Act of 1983 would have directed the President, in determining the level of assistance to a country under the Foreign Assistance Act, The Agricultural Trade Development and Assistance Act of 1954 or The Arms Export Control Act, to consider whether the recipient country engaged in or permitted its nationals to broadcast copyrighted works of United States nationals without their express consent. A finding that such activities were permitted would have enabled the President to halve the amount of assistance authorized for a concerned country.

Subsequently, Title II of Public Law 98-67, The Caribbean Basin Economic Recovery Act (popularly called the Caribbean Basin Initiative [CBI]), sought to create economic incentives for Caribbean nations to respect United States copyrighted works and to cease exploiting and eroding their value by satellite signal "poaching" and other activities which would constitute copyright infringement under our law and the laws of most other nations. 4/ It did so by conditioning eligibility for CBI trade benefits upon mandatory and discretionary eligibility requirements: first, a mandatory requirement that signal "poaching" and rebroadcasting by governmental organizations be proscribed; 5/

Compliance with the requirement could be waived if the President determines it to be in the national interest. The report of the House Foreign Affairs Committee observed:

> This provision reflects the committee's concern with the unauthorized foreign broadcast of copyrighted materials received through the interception of satellite signals. In particular, the Jamaican Broadcasting Corporation, a Government agency, and private parties in other Caribbean countries are intercepting pay-TV signals carried by American domestic satellites and are rebroadcasting motion pictures and other TV programs without the consent of the American copyright owners. This practice is not consistent with international convention and deprives the American owners of the copyrighted program material of their property without compensation.

H.R. Rept. 98-192, International Security and Development Cooperation Act of 1983, Committee on Foreign Affairs, House of Representatives, U.S. Congress, 98th Cong., 1st Sess., at 82.

4/ The unauthorized further distribution of transmissions of copyrighted works to members of the public constitutes an infringement of the copyright owner's exclusive right of public performance, regardless of the technique of the originating transmission or of the further distribution. §106(4), Pub.L. 94-553. "... The concepts of public performance and public display cover not only the initial rendition or showings, but also any further act by which that rendition or showing is transmitted or communicated to the public.... Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a 'performance' or 'display' under the bill, it would not be actionable as an infringement unless it were done 'publicly.'" H.R. Rept. 94-1476, at 63.

5/ Pub. L. 98-67, §212(b)(5).

second, a requirement, to be applied in the discretion of the President, that similar activities by nationals be proscribed; 6/ and, third, a consideration of the extent to which the country concerned provides "adequate and effective means for foreign nationals to secure, exercise and enforce exclusive rights in intellectual property." 7/ The practical impact of CBI upon both the problem of signal "poaching" and the intellectual property regimes of Caribbean states is considered later in this Report. 8/

These varied discussions brought to the surface fundamental questions of the ability of the international copyright community to respond effectively to the challenges of new technologies, whether the widespread, global piracy of United States intellectual property signifies a failure of international copyright law, and whether, perhaps, new approaches to secure international commercial justice in intellectual property are called for.

Awareness of the increasing role which intellectual property plays in United States economic activity and wide publicity concerning enormous losses in foreign markets because of "counterfeiting" or piracy markedly increased during 1983 and 1984. In no small part this awareness was spurred by the efforts of an industrial coalition which, beginning with patent and trademark interests, now includes a wide range of copyright proprietary groups.

6/ Id., §212(b)(10)

7/ Id., §212(b)(9).

8/ Infra, 107 et.seq.

Before the Congress, Executive agencies and in the courts, copyright, patent and trademark interests have pressed for greater protection against the importation of piratical goods into the United States, and have further urged a greater commitment from the federal government to strive for protection of United States intellectual property abroad.

Against this background, the Copyright Office was asked to submit a report to the Senate Judiciary Subcommittee on Copyrights, Patents and Trademarks and to the House Foreign Affairs Subcommittee on Western Hemisphere Affairs, discussing ways in which the government could further support the export position of copyright industries. 9/

In the months that have passed since the preparation of this report commenced, the pace of events has quickened: a consensus appears to have emerged in favor of conditioning eligibility for Generalized System of Preferences (GSP) benefits upon the recipient country's respect for United States intellectual property; bilateral consultations with Taiwan authorities and the government of Singapore have brought the strong concerns of the United States government and copyright industries to two of the places where copyright and trademark piracy appears to flourish; 10/ proposals have been made to strengthen the ability of the United States Customs Service to keep piratical goods out of the United States; and the certification process for CBI designation has been substantially completed, giving some limited, but practical, experience with the use of trade-based incentives to promote intellectual property recognition abroad.

9/ Letter from Congressman Michael D. Barnes to David Ladd, Register of Copyrights, June 14, 1983; letter from Senator Patrick Leahy to David Ladd, June 15, 1983.

10/ For a discussion of the piracy situation in Singapore and the Taiwan copyright consultations, see, infra, 86.

In short, separate from the well-established multilateral copyright agreements and the organizations it has established, an effort to promote United States copyright protection through trade leverage or similar sorts of unilateral or bilateral efforts has emerged. As will be analyzed later, the copyright laws and trade policies of nations have always interacted; but this interaction has so far led to the creation of institutions for the progressive spread and modernization of copyright within the international copyright organizations, i.e., UNESCO, which is Secretariat to the Universal Copyright Convention (UCC) and the World Intellectual Property Organization (WIPO), which is Secretariat to the Berne Convention for the Protection of Literary and Artistic Property. 11/ These institutions and the treaties they serve, based upon international consensus, embody a tolerance, even an expectation, of potentially significant variations in copyright protection available among the some 120 nations of the world. In an immeasurable but unmistakable way, the interest of some United States copyright industries in using trade and other foreign policies -- as either carrots or sticks -- signifies some loss of confidence in the ability of present collaborative, multilateral copyright structures to cope with technologically driven piracy and the modernization of copyright regimes to suit new means of creating and exploiting creative works.

In preparing this report, the Copyright Office tried to identify the copyright problems which confront United States authors and rightsholders in

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11/ Both UNESCO and WIPO are specialized agencies of the United Nations. The United States is a member of the UCC, but not the Berne Convention.

foreign countries and to describe the various legal or political tools which might deal with them. As the Office noted during the hearings on S.736,

> The selection of the specific legal incentives or tools is for the Congress to create and for the Executive to wield in the conduct of our foreign political and economic policies. It is our hope that this study can serve as a basic discussion document ....

Broadly speaking, the tools are of two kinds: multilateral agreements, and the consensus upon which they rest and which they can engender; and unilateral actions or bilateral agreements, usually within the matrix of trade policy. The goal, and the achievement, of the international copyright systems, expressed and governed by the two great multilateral treaties, the Berne Convention and the Universal Copyright Convention, are to protect the fundamental rights of authors and rightsholders in all signatory countries and to do so upon the basis of an agreed minimum level of protection. 12/ In so doing, the Conventions recognize that everyone everywhere benefits from authorship anywhere, to some degree overcome parochial national interests, and provide a common foundation under the particularities and differences in

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12/ The Preamble of the 1952 UCC declares:

The Contracting States,

Moved by the desire to assure in all countries copyright protection of literary, scientific and artistic works,

Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts....

The Preamble to the 1971 Paris Act of the Berne Convention more successfully states:

> The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works,

national legislation, and allow for developing, on a continuing basis, an enlarged conception of authors rights in the light of experience and new needs.

The means to these ends are twofold -- the basic principle of national treatment and of a commitment to a basic common level of "adequate and effective" protection. The contemporary stresses on the international copyright system represent not so much defects in the system itself as the facts that (1) rapid changes in technology and commerce, especially international commerce, have strained their ability to adapt, and to adapt quickly enough,in elaborating and redefining the meaning of "adequate and effective," and (2) many countries, especially those in which widespread abuse of copyright is occurring, remain outside the systems. But these problems, severe as they are, should not obscure the achievement of establishing the principle of national treatment -- that countries should treat all authors as they treat their own -- and an international standard of adequate and effective protection, however imprecise and however in need of revision. 13/

13/ "The rule of national treatment for foreigners is often called, and rightly called, the cornerstone of international copyright. This is in particularly true for the Universal Copyright Convention which, in contrast to the Berne Convention, does not contain detailed provisions on a number of rights to which authors from other member countries are entitled.... Even under the Paris Act of that convention, which ensures to foreign authors four minimum rights but leaves ... the details of implementation to national legislation, the equalization of the treatment of foreigners and nationals is the foreign author's real safeguarded for adequate and effective protection abroad." E. Steup, "The Rule of National Treatment for Foreigners and its Application to New Benefits for Authors," 25 Bull. Copy. Soc. 279 (April, 1978), at 279; 1 S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 183-84 (New York:1938); Berne Convention for the Protection of Literary and Artistic Property, Art. 5, Copyright Laws and Treaties of the World [herein cited as CLTW.]; W.I.P.O., Guide to the Berne Convention 32 (Geneva: 1978) [herein cited as Berne Guide.]

But piracy is widespread, and change requires revision of definitions of what can be considered adequate and effective. The problems are especially acute because commerce, including commerce in copyrighted works, is increasingly transnational, because in the case of the United States commerce in copyrighted works looms as an increasingly critical component of its international trade, because the problems of adapting copyright to the new technologies are universal, and because the international copyright organizations, deriving from European sources, increasingly embrace larger membership of countries in widely varying stages of commercial and cultural development with disparate legal traditions. 14/

It is in the national interest to encourage high levels of protection for works of authorship. There is at the threshold the imperative of fostering creativity everywhere. But the United States leads in commerce in copyrighted works, and untold numbers of Americans and American enterprises depend for their livelihood on the effectiveness of copyright protection. 15/

The question then is how to protect and foster these interests. The thesis argued here is that the United States must seek to use both the multilateral copyright conventions and unilateral action to secure "adequate and effective" protection of copyright, and that critical judgment is involved

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14/ In 1965, 54 states were members of Berne Union, of which 21 were developing countries. At the same time, the UCC had 51 members, of which 25 were developing. See, BIRPI, 1 Copyright 4-5 (1965) and 18 UNESCO Copyright Bulletin 5 (1965). By 1984, the Berne Convention had 76 members of which 44 were developing countries. Of the 78 members of the UCC in 1984, 44 were developing countries. WIPO, 20 Copyright 6 (1984, January); 18 UNESCO Copyright Bulletin 98, 106. (#1, 1984).

15/ At the request of the Subcommittee on Patents, Copyrights and Trademarks, Committee on the Judiciary, United States Senate, the Copyright Office is preparing, in cooperation with the Bureau of Economic Analysis of the Department of Commerce, a study of the magnitude of United States copyright-related industries. This report is due to be completed by the end of 1984.

in deciding where unilateral action should be taken and of what kind. This report suggests elements which should enter those judgments, and recommends some specific actions.

We must in any event seek to extend the rule of law in copyright, and a standard of adequate and effective protection, to those countries which do not now observe them, and to work for successive new consensuses on what "adequate and effective" means in new technological and commercial environments. The means to these ends are the international multilateral copyright convention themselves.

On the first, we must seek to encourage all countries to become a part of the international copyright system. The United States had long done so. And to that objective there are several paths:

1. To continue in the international organizations to extend and elaborate principles of copyright, to give fresh meaning to the standard of "adequate and effective," and to adapt copyright to radically changed, and rapidly changing, circumstances.
2. To participate, unilaterally and with the international organizations, in training personnel in developing countries and those outside the international copyright system, in principles of copyright and copyright administration.
3. To encourage American businesses to establish and expand commercial copyright relations with such countries in a manner calculated to serve their markets and suitable to their circumstances, and designed to foster indigenous authorship and an interest in the development and expansion of copyright.

4. Where necessary, to use in bilateral dealings whatever negotiating and bargaining power is available to curb piracy and other indefensible commercial practices in the first instance, and to bring countries where such practices occur into the code of conduct of civilized states expressed in the conventions.

Such a strategy is for the long haul, but it is a necessary strategy. Even if we are able bilaterally to require one nation, or some nations, to adopt copyright laws to our liking, we cannot do so for all of them. We should encourage adherence to international standards of "adequate and effective protection," yes; we should seek to revise the meaning of that standard as required, yes; but drawing upon our own history, we must allow our trading partners to expand and develop their laws and practices in light of their own interests and experience. In short, we must follow the principle of national treatment, constantly seeking to adapt, revise and extend the standard of "adequate and effective" protection undergirding all national laws.

Preparing this report has reinforced the Copyright Office's view that there are no "single solutions" to all international copyright problems. Just as not all difficulties may be solvable within the framework of international copyright agreements, problems exist which may not be amenable to solution through reciprocity-based trade bargaining. The leverage which may exist at one point in time or one place may not be effective later or elsewhere. Not all works are equally vulnerable to piracy; not all industries do business in ways which might tend to co-opt piracy. Without industrial statesmanship on the part of copyright owners, carefully modernizing their business practices to serve markets and cut out pirates, public statesmanship to secure copyright

recognition abroad will be hollow. The development of policies to promote and protect our copyright industries requires a commitment to use more than one track, technique, or institution; and so we have tried to answer Congress' question to us in its largest context: is there a need to improve the entire system for establishing "adequate and effective" copyright protection throughout the world? If there is, how and to what ends shall the United States use its considerable economic and political power? There are, in fact, a number of interrelated steps that the United States could take inside and outside of the multilateral copyright systems which can help the position of our copyright industries abroad and, at the same time promote global recognition of the hard-won and perhaps endangered rights of authors.

The report is divided in four parts. Because any policy or action must be undertaken with present treaty obligations in mind, Part One traces in some detail the development of the international copyright obligations of the United States, their bases, and, in particular, the programs within the international copyright system to develop copyright law and practice throughout the world. Part Two canvasses the commercial problems which confront authors and copyright owners, ranging from the global outbreak of film and record piracy to the long-standing apparent refusal of certain states to honor any international copyright principles. Part Three describes legislative proposals in the United States to link copyright with trade and aid preferences or benefits to the end of strengthening copyright protection abroad. In Part Four, the Copyright Office attempts to extract policy questions or problems which the Government, particularly the Congress, might usefully consider, and offers some recommendations for specific undertakings.

PART ONE: THE BASES OF UNITED STATES INTERNATIONAL COPYRIGHT RELATIONS

When reviewing the availability and level of copyright protection throughout the world, particularly in newly emerging and lesser developed countries, it is useful to trace the early stages of United States international copyright policy development. The concerns raised by many nations over possible foreign economic or cultural domination and fears of higher costs for essential educational materials echo those heard in this country a century ago. American voices were then heard to say that non-recognition of foreign copyrights was just good business practice. The purpose of this discussion is not to excuse such attitudes today, but rather to put them in perspective within any nation's pattern of economic and cultural development.

Early History: Isolationism

The first United States copyright law, enacted May 31, 1790, strictly limited the eligibility of works for protection only to those which were published and authored by United States citizens and residents. So resolutely did the new nation reject the policy of protecting the works of foreign authors that Congress did not stop at such implicitly restrictive requirements, adding in Section 5 that:

> ... [N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.

For over 100 years this flat statement was the international copyright policy of the United States. A principal consequence of this policy was that American works were not protected outside of the United States. The history of this policy has been aptly summed up by Dr. Arpad Bogsch, Director-General of the World Intellectual Property Organization (WIPO):

> During that century, most of the leading European countries concluded bilateral arrangements for the reciprocal protection of the works of their authors, and in 1886, they "constituted themselves into a Union for the protection of the rights of authors" by signing the so-called Berne Convention, a multilateral treaty for the protection of copyright, based on the principle of national treatment (i.e., that each member country would protect works originating in other member countries on the same basis as it protected its own domestic works). The United States did not participate in the creation of the Berne Union and has never become a member of it. Nor did the United States, during this first century of federal copyright legislation, make any bilateral arrangements with any foreign country for reciprocal copyright protection. 16/

Bilateralism: United States Entry Into International Copyright Relations

Internal and external pressure to reform United States isolationist copyright attitudes (the latter principally from the United Kingdom) had been mounting since the late 1830's. By the close of the nineteenth century, the United States was finally prepared to enter into copyright relations with other nations. Yet this new policy was tempered by the fear of placing domestic printing and publishing industries under the possible control of British copyright holders. These concerns were reconciled in the Act of March 3, 1891, commonly referred to as the Chace Act. 17/

16/ A. Bogsch, "The Protection of Works of Foreign Origin," COPYRIGHT REVISION STUDY #32 (1958) at 1.

17/ §3, Act of March 3, 1891, 26 Statutes at Large of the United States, from December 1889, to March, 1891, at 1106. The manufacturing requirement, in greatly diluted form, persists in our copyright law. 17 U.S.C. §601.

The Chace Act empowered the President to "proclaim" the works of nationals of foreign countries eligible for United States copyright, based upon a finding that the country in question accorded to United States works substantially the same protection as it gave to those of its own citizens. In exchange for the national treatment received from a country, the United States would grant national treatment under its laws. However, non-discrimination between foreign and national authors also meant non-discrimination in the law's burdens. United States copyright law had long required compliance with a variety of formalities -- notice, registration, renewal, recordation -- upon which the existence of copyright could depend. In practice, compliance with these formalities was more awkward for foreign than local publishers. The Chace Act added a further formality to this already formidable list: books and certain other printed materials had to be manufactured in the United States (the so-called "manufacturing clause") 18/

Between 1891 and the general copyright revision of 1909, sixteen Presidential Proclamations were issued on behalf of the authors of European and Latin American countries. 19/ Refinements were made to the President's proclamation authority in the 1909 and 1976 revisions of the copyright law. 20/ Under the "proclamation system," copyright relations were established with 35 countries. In the cases of three other countries, copyright relations were established by

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18/ Although the "manufacturing clause" today is substantially liberalized and no longer applies to foreign authors, printers and book manufacturers still believe it essential to protect them against unfairly priced foreign printing and manufacturing services.

19/ Infra, at 109, et. seq.

20/ Infra, at 19.

treaty. With the significant exception of The People's Republic of China, the United States has not initiated bilateral copyright relations with another state since the UCC came into force in 1956.

The existence of the UCC has not deprived pre-existing proclamations and treaties of continued contemporary importance. 21/ Protection for works published prior to the coming into force of the UCC still depends upon having complied with the terms of the other country's reciprocal proclamation, or with their domestic law in force at the time of first publication of a work.

Bilateral copyright arrangements had a clear and valuable role in this nation's early venture into foreign copyright recognition. The practical selectivity of bilateralism made easier to accept the principle of international copyright relations; and bilateral agreements usually called for national treatment which permitted the system of formalities to mitigate the practical impact of large-scale recognition of foreign copyrights.

Still, the entire bilateral approach of the United States between 1891-1952 was the defensive stance of a copyright importer. It was not the policy of a nation with a substantial stake in foreign copyright markets. Although Presidential proclamations did secure copyright eligibility for United States authors in proclaimed countries, it is fair to say that they were issued as much to mute international criticism of United States piracy as to protect United States copyright exports. While the inconvenience to our copyright holders of foreign formalities, largely centering around "first

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21/ Art. 19 of the UCC expressly provides that the Convention "shall not abrogate multilateral or bilateral conventions in effect between two or more Contracting States." In the event of differences between the UCC and a pre-existing bilateral, the terms of the UCC are governing. See, R. Dixon, "The Universal Copyright Convention and United States bilateral Copyright Relations," in KUPFERMAN & FONER, UNIVERSAL COPYRIGHT CONVENTION ANALYZED [illegible] (FLP: 1955).

publication" requirements, were real, they were not a source of widely felt dissatisfaction. 22/ The early United States film, music and sound recording industries were pre-occupied with serving the strong and deep domestic market; and the growth of mandatory public education generated demands for copyrighted materials which absorbed the commercial attentions of United States books publishers. Export markets were few for many United States-origin works.

22/ The situation had changed by the 1950's. Dixon notes:

> ... [B]ilateral arrangements merely assure United States copyright proprietors that they will receive the same protection under the law of a foreign country as the nationals of that country receive. All requirements of the foreign law applicable to local nationals must be met. While it is by no means true that all countries have formal requirements upon which copyright protection is conditioned, where they do exist they are sufficiently burdensome to cause the United States proprietor considerable trouble and expense in assuring his foreign protection. In addition, they are sufficiently widespread to create a major problem under the bilaterals in obtaining a broad geographical protection. One of these requirements is that a work, to be protected in a country, must be first published in that country.... Others are registration of the work and deposit of copies, the payment of fees, the obtaining of the services of local attorneys or other representatives, and the notarization of applications. Perhaps even more burdensome than the actual meeting of these requirements is the necessity of maintaining a continuing familiarity with the laws, regulations and court decisions of a large number of countries in order that detailed procedural steps may be properly taken and properly timed. Errors in information or timing can often lead to loss of copyright, and the burdens entailed may be sufficient to cause the proprietor deliberately to forego the acquisition of protection in many areas. Dixon, op.cit. at fn. 20, at 119-20. See, also, A. Bogsch, THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION 24 et.seq. (Bowker:1964) [Hereinafter cited as Bogsch, UCC].

Bilateral Copyright Relations Under the 1976 Copyright Act

Although the United States has not employed the proclamation process for about thirty years, the option is still a feature of the copyright law. Indeed, a fair amount of attention was paid to revising the bilateralist provisions during the early development of the 1976 Copyright Act.

The 1961 Report of the Register of Copyrights on Copyright Law Revision proposed a radical departure from previous law: "extension of copyright protection to foreign works generally, without requiring reciprocity...." 23/ The reasons for this proposal were theoretically sound: 1) works of United States authors were then protected in every country where copyright was of significant value; 2) with respect to the then - forty countries with whom the United States did not have copyright relations, withholding protection for their authors' works would not itself be a strong incentive for such states to protect United States works; 3) even if United States works here remained unprotected in unimportant markets,the copyright eligibility of their authors here would enable domestic publishers to acquire and exercise exclusive rights in foreign works; and 4) unilateral recognition of copyright in the works of authors of developing nations might encourage their sympathetic interest in copyright and, eventually, their adherence to the UCC. 24/

The Register's recommendation was not, however, unqualified: at the same time as the door to United States copyright eligibility was to be thrown wide open, the President was to be given the power to close, or narrow, the

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23/ The Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, July, 1961 (Comm. Print: 1961), 87th Cong., 1st Sess. at 118-19. [hereinafter cited as 1961 Report].

24/ Id.

entrance. A proviso would have empowered the Chief Executive "to withhold, suspend, or restrict statutory protection for the works of nationals or domiciliaries of any country." 25/

Reaction to the Register's proposal was unfavorable:

> There appeared to be a definite consensus in opposition to providing this "automatic" protection to published works of foreign origin. It was argued that an underpinning of reciprocity may still be necessary in order to insure adequate protection for American works in some foreign countries, and that it would not be in the national interest to place the President in the position of making negative declarations denying protection to works originating in those countries designated by him. 26/

As a result of this consensus, the decision was taken to retain the proclamation procedure in section 104(b)(4) of the 1976 Act and to accept the Register's recommendation that the President be authorized to modify the protection accorded under a proclamation. 27/

25/ "This power should be available in special situations, or in cases of discrimination against U.S. citizens -- although, of course, it would not be exercised in violation of our treaty obligations. There would probably not be many occasions to use this power." Id., at 119. At first reading, the Register's proposal appears to contemplate the possible use by the President of this new power against any state, which would, of course, include UCC states. Subsequent discussions made clear that the President's power to cut back on copyright extended to "all" authors, regardless of nationality was to be limited to non-UCC states. The position urged by the Register in 1961 was subtly geared to expand UCC membership by giving UCC states the potential and probability of "greater" national treatment than non-UCC states. See, COPYRIGHT LAW REVISION, pt. 2, Discussion and Comments on the Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, at 189 [Comm. Print: 1963], 89th Cong., 1st Sess. [hereinafter cited as COPYRIGHT REV. pt. 2].

26/ Copyright Law Revision, Pt. 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 7 [Comm. print: 1965], 89th Cong., 1st. sess. This assessment summarized rather more strongly held views than the language suggests. Representatives of motion picture interests felt the proposal to be "completely unrealistic," lacking a "logical basis" and ill-calculated to achieve the goal of expansion of the U.C.C.; COPYRIGHT REVISION, pt. 2, op. cit., at 188-89.

27/ 17 USC 104(b)(4) provides that copyright protection extends to a work when it "comes within the scope of a Presidential Proclamation:"

Contemporary Significance of Bilateralism

While the bilateral proclamation process has not been used since 1956, the provisions of Section 104 (b)(4) may deserve renewed attention in light of changed circumstances. In 1961, the forty or so countries with whom the United States did not have copyright relations might correctly have been viewed as secondary markets at best. The absence of reciprocity was relatively unimportant, since copyright-related activity in these nations was low. Some of these nations have since become important primary markets. Singapore and South Korea, among others, are not yet large markets for many United States copyrighted products, but have become major centers of piracy, including the export of copies and phonorecords to markets where their distribution is illegal. Thus, the economic losses to American copyright industries from video piracy in states such as Saudi Arabia and Kuwait, for example, include losses due to exports of illegal copies of works throughout Western Europe and the Mediterranean. Whether one's focus is upon expanding markets or expanding piracy, United States copyright owners can no long consider any place as "unimportant" in copyright terms.

> Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the President may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation.

Given the number of states that have remained outside the multilateral copyright treaty system, it is appropriate to consider whether the United States ought to seek bilateral copyright relations with a number of them under section 104(b)(4). The President's power under this provision would enable bilateral copyright relations to be tailored to meet this nation's specific needs and concerns as well as those of the other country. Even without conditions or limitations attached, bilateral copyright relations may be appealing as a means of solving major commercial problems with major trading partners who view the prospect of protecting foreign works with the same sort of reservations the United States did at the turn of the century.

There are, however, several policy implications which would be raised through the aggressive pursuit of new bilateral copyright arrangements. First is the political question of whether such actions would be interpreted as a retreat by the United States from multilateralism, thereby causing concern in many UCC and Berne Convention states. The United States has so long expressed its preference for establishing copyright relations with other nations through adherence to the UCC that a shift to bilateralism could delay the entry of new states into the international copyright community.

Second, global markets for books, films, sound recordings, computer software, and broadcast programming necessitate reasonable copyright protection on a global basis, under generally harmonious national regimes. As explained later, the Middle East and Pacific Basin are two regions where piracy is rife and copyright principles are only grudgingly acknowledged. 28/ Even if bilateral agreements lead to some control over local piracy, their effect may simply be to encourage pirates to move to more congenial states in

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28/ 41. See, infra, at 76, 82.

the region. New bilaterals, varying in their scope or terms, could become a crazy-quilt of law combining the worst features of pre-existing bilaterals with rapid obsolesence caused by technologic change.

Finally, there is an important political and legal question. Through the rule of national treatment, multilateral copyright agreements link the prosperity of foreign authors in a given state with those of national authors, thereby creating international communities of interest among all the world's authors. Authors everywhere are able to assert at home, if only in a political fashion, claims to basic economic and moral rights recognized by widely accepted conventions acknowledged in the United Nations Declaration of Human Rights, and embodied in the domestic laws of virtually every civilized country. And, whatever their shortcomings, multilateral copyright treaties are international law; bilateral copyright relationships simply do not build the international law of authors' rights as effectively.

Multilateralism in International Copyright: The Development of the Berne Convention

In tracing the development of United States bilateral copyright relations, reference was made to the European movement toward an integrated copyright system. Before turning to the 1952 negotiation of the Universal Copyright Convention, it is necessary to examine the Berne Convention and its relationship to the protection available abroad for United States copyrighted works.

A text of Berne has been in force from 1886 to the present. The United States has repeatedly declined to adhere to Berne and ultimately entered into world-wide copyright relations by creating a new convention rather than by joining the established one. The reasons will be discussed later in this Report. 29/

The Berne Convention of 1886 was the product of a quarter of a century's deliberations, during which many of the leading literary figures of Europe lent their voice and prestige to the cause of international copyright recognition. 30/ The Swiss government, in circulating the draft convention to states, aptly observed:

29/ Thorwald Solberg, the first Register of Copyrights', was an advocate of adherence to the Berne Convention, referred to as the International Copyright Union. In 1936, he testified before the House Committee on Patents:

> There is one dominant consideration with respect to the present copyright situation to which the attention of the members of this committee should be directed; that is, the fact that the present supremely important copyright matter is to secure the adherence of the United States to the International Copyright Convention and thus become a member country in the International Copyright Union. Statement of Thorwald Solberg, in Hearings before the Committee on Patents, House of Representatives on Revision of the Copyright Laws, 74th Cong., 1st Sess., 3 April 1936, at 1.

For discussions of the relationship between USA difficulties in adhering to Berne and the formation of the UCC in 1952, See, generally B. Ringer, "The Role of the United States in International Copyright," 4 COPYRIGHT 215 (Oct., 1968); Ex. Rept. No. 5, The Universal Copyright Convention of 1952, to accompany Ex. M., 83rd Cong., 2d. Session (1954); A.B.A., Report of the Committee on International Copyrights, 1953 Reports of Committees of the Section of Patent, Trademarks & Copyright Law of the American Bar Association, at 53-84 (1953); H. Henn, "Quest for International Copyright Protection," 39 Cornell L.Q. 43 (1953); A. Kuhn, "Work of UNESCO on Copyright," 43 Am. J. of Int'l Law 343 (1949).

30/ Prof. Ladas traces the origins of the Berne Convention to the Congress of Authors and Artists which met in Brussels in 1858. This Congress and succeeding Congresses in 1861, 1877 and 1878 are discussed in 1 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 71-75 (1938) [hereinafter cited as LADAS].

> The Federal Council has not concealed from the initiators of this project that it saw difficulties in its realization. However, it would certainly be a great gain to conclude at this time a general understanding by which this higher principle and, so-to-speak, natural right would be proclaimed: that the author of a literary or artistic work, whatever his nationality and the place of publication, must be protected in every country the same as the nationals of such country.
>
> When this fundamental principle is once admitted and the Union is constituted on this basis it is beyond doubt that, under the influence of the exchange of views which would take place between the countries of the Union, the most shocking differences existing in international law will gradually disappear and a new regime will be established, more uniform, and consequently more secure for authors. 31/

On September 9, 1886, ten states signed the Berne Convention for the Protection of Literary, Artistic and Scientific works. 32/ The Convention has been revised six times since then, most recently in 1971. 33/

31/ LADAS, at 76.

32/ The ten original signatories of the 1886 Convention were Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland and Tunis.

33/ To the Berne Convention of 1886 was added in 1896 an Additional Act and Interpretive Declaration. This was important to United States copyright interests as it extended protection under the Convention to works of non-Unionist authors first published in a Union state. Wholesale revisions of the Conventions were made at Berlin (1908), Rome (1928), Brussels (1948), and Stockholm (1967). A partial revision of the Convention was made, parallel to a revision of the UCC, in 1971. The texts of all the Acts of the Berne Convention are reproduced in COPYRIGHT LAWS & TREATIES OF THE WORLD (WIPO-UNESCO) [hereinafter cited as CLTW].

The original text of the Berne Convention was fairly simple; its guiding principle was national treatment. 34/ In addition, the Convention established several provisions "forming common legislation for the Union." 35/ Throughout its history, the Berne Convention has closely pursued the elimination of discrimination against foreign authors, and the steady expansion through consensus of the legislative character of the Convention.

In 1896, the Berne Convention was amended to refine the points of eligibility for protection of a work within the countries of the Union: protection was made available to works first published in any country of the Union -- with publication being defined, essentially, as the issuance of copies of a work to the public.

34/ Article II, Berne Convention, Additional Article and Final Protocol, 1886, CLTW, Berne Copyright Union: Item A-1. "National Treatment" under the original Convention was not unqualified, as the enjoyment of such treatment depended upon "the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work...." Id.

35/ The quoted phrase is Ladas',(LADAS, op. cit. at 84), but it embodies the juristic essence of Art. 2(6) of the 1971 Paris Act of Berne, which provides, in relevant part, "the works mentioned in this Article shall enjoy protection in all countries of the Union." Claude Masouye, the distinguished international copyright scholar, has observed of this article:

> This provision, introduced in its present form at the Brussels Revision (1948) bears, from the point of view of international law, some importance. In the earlier texts, the Convention restricted itself to laying down that the countries of the Union were bound to make provision for the protection of works. The new text provided for a protection directly founded on the Convention itself. In almost all countries, the applicability of a treaty calls for its ratification and the promulgation, executive or legislative, thereof.
>
> But once this has happened the Convention becomes part of the country's law: if therefore its wording is apt to confer rights directly, individuals may bring action based on the Convention itself to enforce them. The Brussels wording (particularly in the French text -- "jouissent") has this result. WIPO, GUIDE TO THE BERNE CONVENTION 21 (Geneva: 1978) [hereinafter cited as BERNE GUIDE].

The 1908 revision of the Berne Convention in Berlin introduced features which are still vital today: 1) a fuller elaboration of the subject matter of copyright; 2) a prohibition of formalities as preconditions for the acquisition, exercise, or enjoyment of copyright; 3) a minimum term of protection based on the life of the author plus 50 years post mortem; 4) a recognition of the exclusive translation rights of authors; 5) a regime governing mechanical reproduction rights; 6) a specification of certain public performance rights; and 7) a recognition of the important principle that copyright protection in any country of the Union is independent of protection in a work's country of origin. 36/

36/ Paris Additional Act and Interpretive Declaration, 1896, CLTW, Berne Convention Union: Item C-1. To the enumerated list of works included in the 1886 Convention's understanding of "literary and artistic works" were added choreographic works, pantomines, architecture and a comprehensive recognition of the copyrightability of derivative works, including cinematographic works, Id., Art. 2, 14. Art. 4 embodies the second and seventh features listed in succinct and unequivocal fashion:

> The enjoyment and exercise of these rights shall not be subject to the performance of any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the express stipulations of the present Convention, the extent of protection, as well as the means of redress secured to the author to safeguard his rights, shall be governed exclusively by the laws of the country where protection is claimed.

The expanded term of protection is provided for in Article 7 of the Berlin Act. It permits, however, the application of reciprocity between Unionist states in calculating term. Article 8 deals with translation rights and Article 13 recognizes the right of the author of musical works to control "the adaptation of those works to instruments which can reproduce them mechanically." This provision rejected the apparent position taken in Protocol 3 of the 1886 Berne Convention that such mechanical continuances were not infringing. There is a close interaction between the attitudes toward mechanical reproductions of music and their copyright treatment in Berne and the USA. See, H. Henn, "The Compulsory License Provisions of the U.S. Copyright Law, Copyright Revision Study #5, at 41-43.

The Berne Convention: "Backdoor" Protection for United States Works

For purposes of this report, the most significant aspect of the above-mentioned rules is that they enabled United States works to secure copyright protection in Berne Union countries without adherence to the Convention. This was made possible by the extension of Berne protection to works first published in any member state of the Union. Since April 10, 1928, Canada has been an independent member of Berne; with its proximity to United States publishing centers, it became a "backdoor" to protection under the Berne Convention, through simultaneous first publications in the United States and Canada.

Notwithstanding the bilateral copyright relations which existed between the United States and a number of important Berne states, "backdoor" protection was desirable since it overcame eligibility and formality requirements under bilateral agreements (including in many instances the requirement of a first publication on the territory of the state where protection was sought). Under Berne, such formalities could not be interposed. As a technical matter, the protection available under bilaterals could be lower than that available through the "backdoor" to Berne. Realistically, in return for Berne-level protection, the United States was according Berne states a shorter term of copyright and imposing formalities as conditions of protection for foreign works in United States markets.

The failure of the United States to enter into multilateral copyright relations while enjoying "backdoor" benefits of Berne could not long be maintained without political difficulties. 37/ In 1912, the United Kingdom made proposals to modify the Berne Convention to remedy what it saw as discrimination against the works of its authors by the United States. In 1914, an additional Protocol to the Berne Convention was signed at Berne, providing that:

> Where any country outside the Union fails to protect in an adequate manner the works of authors who are subject to the jurisdiction of one of the contracting countries, nothing in the Convention of the 13th November 1908 shall affect the right of such contracting country to restrict the protection given to the works of authors who are at the date of the first publication thereof subjects or citizens of the said non-union country, and are not effectively domiciled in one of the countries of the Union. 38/

37/ The 1909 revision of the United States copyright laws lifted the burden of the requirement of domestic manufacture for certain works published in a language other than English. As satisfying as this may have been to Continental authors, it provided little comfort to our closest cultural trading partner, the United Kingdom.

38/ Berne Additional Protocol, 1984, CLTW, Berne Copyright Union: item D-1, para. 1. Ladas recounts:

> In 1912 Great Britain ratified the Convention of 1908 .... [I]t proposed to the member countries of the Union the adoption of an Additional Protocol granting to each member country the right to restrict, within its territory, the benefits of the Convention with regard to authors of a non-member country the right to restrict, within its territory, the benefits of the Convention with regard to authors of a non-member country. A resolution approving the adoption of such a Protocol was unanimously adopted by the Congress of the International Literary and Artistic Association at The Hague in 1913. It appears that the question was placed before the members of the Union without ambiguity; the issue lay between losing the British Empire from the Union, and finding the solution desired by the Empire to do away with the inequitable situation created as the the treatment of British authors in the United States and that of American authors within the Empire.
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> The result was that all the member countries of the Union accepted the text of an Additional Protocol proposed by Great Britain and signed at Berne on March 20, 1914. It

This power of retaliation against non-Unionist authors and their works has, however, never been invoked.

Consideration of United States Adherence to the Berne Convention

With the quickening pace of United States international copyright trade since the Second World War, the elimination of copyright frictions which might encourage retaliation against the United States became a matter of considerable importance. This was perceived in general by Acting Register of Copyrights Richard C. DeWolf in 1945:

> [I]f there is a vacuum in the literary and artistic production of Europe, it will be filled to a considerable extent by the products of America.... [T]here will be a greater need than ever to protect works originating in the United States from piracy in Europe, the temptation to which may well be increased by poverty. History shows that in periods of unrest and even of material distress, people more than ever seek the distraction or the relief afforded by literature, music and art. Impoverishment in Europe will not destroy the appetite for information, edification and entertainment. Within a comparatively short time the demand for American books, American motion pictures, American music, will be as great as ever, if not greater. On the other hand, it may be doubted whether Europe will not continue to be what for centuries it has been, a source of intense intellectual and artistic activity, the products of which are fairly entitled to the protection of our copyright laws, with as little artificial obstruction as possible. 39/

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provided for the deposit of ratifications at Berne within twelve months from this date, and for its coming into effect a month thereafter. 1 LADAS, 96. The application of this provision, now incorporated in Art. 6(1) of the Paris Act of Berne, is discussed in, BERNE GUIDE 39-40.

39/ R. DeWolf, Copyright Revision 45 unpublished ms. 1945; in the Collection of the U.S. Copyright Office.

On several occasions the United States government sought unsuccessfully to secure our adherence to a text of the Berne Convention. 40/ However, given the availability of "backdoor" protection to Berne, the existence of bilateral copyright relations, and since 1952, the existence of the UCC, private sector interest in Berne has waxed and waned. In addition, adherence to the Berne Convention had always appeared to require changes in our domestic law not favored by important and interested segments of our society.

The Universal Copyright Convention: Its Early Development

The structural weaknesses of international copyright became manifest immediately after World War II. Faced with the inability to adhere to the Berne Convention and convinced of the need to improve our copyright relations on a simplified and more predictable basis, the United States, in cooperation with other countries, proposed a new multilateral copyright treaty. 41/

40/ The history of efforts to revise the copyright law undertaken between 1909 and 1924 is the record of our attempts to adhere to the Berne Convention. See A. Goldman, "The History of U.S.A. Copyright Law Revision," Copyright Law Revision Study #1, at 4, et. seq. (1955).

41/ The 1947 Annual Report of the Register of Copyrights merely noted that, "[t]he settlements marking the end of World War II have reopened many earlier copyright arrangements. The present world situation makes desirable the reconsideration of the international copyright policy of the United States and its relationship to the copyright policies of other countries." Annual Report of the Librarian of Congress, 1947, at 94. By 1949, A Committee of Experts (including the Librarian of Congress and the Register of Copyrights) met at UNESCO and agreed to request the views of states on the desirability and feasibility of a new copyright convention. "These developments were reviewed at meetings of the Copyright Panel of the United States National Commission for UNESCO.... After extensive discussions with representatives of United States interests concerned with copyright and with this office [the Copyright Office], the Department of State transmitted its reply to the UNESCO 'Request' indicating a favorable attitude towards proceeding with the program and the essential recommendations of the Experts." Annual Report of the Librarian of Congress, 1950, at 180.

The objectives of the United States and similarly situated nations were direct and simple: 1) to prepare a treaty based more firmly upon "national treatment" than upon detailed minimum rights, thereby reducing negotiating difficulties and permitting the widest acceptance of the new instrument; 2) to tailor the new convention to existing laws, principally our own, so as to permit prompt accession to the new treaty without having to amend drastically domestic copyright laws; and 3) to avoid prejudicing the integrity and future growth of the Berne Convention. 42/

With the consent of the major states party to the Berne Convention, UNESCO began to prepare a new, universal copyright treaty in 1947. On August 18, 1952, 50 states met in Geneva, Switzerland, to negotiate the Convention. Three weeks later, on September 6, 1952, 36 states had signed the newly minted Universal Copyright Convention (UCC).

No delegation to the 1952 Geneva Conference was more eloquent about the purpose of the new treaty than was France:

> You have heard me praise the Berne Convention and, as I know the international public, I wonder whether some of you may not have thought me a little impatient and perhaps lacking faith in this new venture, so much have I been dwelling on the achievements of the past. You might even accuse me of author's pride; yet, ladies and gentlemen, for the old members of the Berne Union, the Berne Convention had a very serious flaw: it did not include the United States of America; it did not include the great Latin American republics (at least not of all of them), nor certain Asian countries; and the French delegation, I can assure you, always felt this defect very keenly.... That great Republic remained faithful to its autonomous principle of the protection of copyright by privilege. Ladies and gentlemen, whilst I regret and deplore this -- and I have been expressing these regrets over the past half-century -- I hope you will believe me when I say I would never allow myself to

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42/ Intervention of John Schulman (U.S.A. Expert), Summary Record of The Third Session, 24 Oct. 1950, Third Committee of International Copyright Experts, 23 Oct. - 4 Nov. 1950, Washington, D.C., reprinted in, 3 UNESCO Copyright Bulletin 42 (#2 , 1950). See, also, J. Schulman, "A Pattern for a Universal Copyright Convention," in 3 UNESCO Copyright Bulletin 81 (#1, 1950).

> criticize it; I would even say that is is quite natural and legitimate for the United States of America to prefer their own autonomous legislation in this matter. But if, today, we of the French delegation are determined to do our utmost to adopt this new Convention, to improve it, if possible, by our amendments, and to make it successful, it is because we are also anxious that America shall take part in the universal protection of copyrights. And I am authorized by my Government to say that the article concerning ratification of the Convention which we are going to sign will only become effective if the Convention bears the signature of 6 or 12 States, of which at least six are non-signatories of the Berne Convention. Moreover, the French Government will not ask Parliament to ratify the Convention unless it already bears the valuable signature of the United States of America and of some of the great American republics with whose thought we wish to remain in contact. 43/

Underneath the deeply felt words of Marcel Plaisant lay a more pragmatic quid pro quo sustaining the agreement on a new convention: if the UCC, through the special copyright notice, could mitigate the impact of United States copyright formalities upon foreign authors and publishers, the effect of reciprocating foreign formalities upon our works might also be minimized. In particular, if domestic manufacturing requirements for books in the English language were lifted for works of the United Kingdom, that country would certainly lift the obstructive requirement of a first publication in the United Kingdom, applicable to certain United States works.

The UCC: Obligations of Contracting States

The successful negotiation of the UCC called forth the political efforts and legal imagination of many governments and private copyright specialists. Since coming into force in 1955 and through its revision in 1971, the UCC has been the cornerstone of United States international copyright relations. It

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43/ Intervention of M. Plaisant (France), Records Of The Intergovernmental Copyright Conference, Geneva, August 18 - September 6, 1952, at 127. [hereinafter, RECORDS (1952)]

is presently adhered to by over eighty nations, many of whom are also members of the Berne convention. Only one important English-speaking market is outside the UCC: the Union of South Africa.

The most fundamental obligations of the UCC are contained in Articles I and II: members are required "to provide for the adequate and effective protection of the rights of authors and other copyright proprietors ...." and to accord to the works of nationals of all UCC states "the same protection as that other State accords to works of its nationals first published in its own territory." 44/

The important UCC requirement of national treatment is intended to prevent discriminatory copyright regimes which favor national over foreign authors. But there are, however, many non-copyright forms of discrimination that the UCC either does not address or has not been applied to. These include tariff restrictions, domestic content quotas limiting access to exhibition and

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44/ Article I of the UCC (both the 1952 and 1971 texts) provides:

> Each Contracting States undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

Article II provides:

> 1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.
> 2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals.
> 3. For the purpose of this Convention any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State.

broadcasting outlets for foreign works, restrictions on doing business on the national territory, protectionist manipulation of taxes or customs valuation regimes, and diversion of earned royalties from copyrighted works away from authors and rightsholders to other favored beneficiaries. These sorts of practices can have as great an impact upon the quality of United States access to local markets as do copyright laws. It is arguable that by preventing discrimination in terms of copyright law, the UCC and Berne may do little more than force states to seek the "benefits" of discrimination though legal means other than copyright. Thus, the impetus to discriminate finds its outlet in trade, cultural or foreign assistance regimes.

It is the other basic UCC concept, that of having to provide "adequate and effective protection," which evokes the obvious uncertainty. "Adequate and effective" are terms seemingly so general in scope as to comprehend states with elaborate and "high-level" copyright laws as well those with barely any copyright statute, per se. 45/ The obligation to accord works "adequate and effective" copyright protection was developed as a means of balancing the

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45/ Thus, the United States, with an elaborate copyright law providing both general and specific guidance to courts on a great range of copyright transactions, co-exists in the UCC with Andorra, whose copyright jurisprudence is summed up in a letter to UNESCO:

> "(a) In the Principality of Andorra, by its very constitution and because of the feudal development of its life, custom is the principal legislative source; therefore, written provisions are extremely few ...
>
> (b) Concretely, with regard to copyright and industrial property, which have very little application in Andorra (where, for example, there is no publishing house), only the case of Radio-Andorra has arisen and it is regulated through private agreements between the station and authors societies in both Spain and France and in any other nation if its authors may have an interest in the broadcasts." CLTW, Andorra: Item A-1

preference of some states for elaborate minimum subject matter and exclusive rights obligations with those of states preferring simplicity and generality in convention obligations. 46/

In considering the concept of "adequate and effective" copyright protection, Dr. Arpad Bogsch has observed:

> The lack of enumeration of the rights which must be protected in order that the standard of "adequate and effective" protection could be considered as met, has both its drawbacks and its advantages. The drawback of this very general language is that there is no sure guide in borderline cases or where uniformity or near-uniformity among civilized countries is missing.
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> The general, not to say vague, language of Article I, has, on the other hand, the very distinct advantage that as the view of the civilized countries change in respect of what is adequate, so will the obligations of the countries under Article I. Without modifying the language of the Convention, its material content will consequently undergo changes, and the Convention will, so to speak, automatically keep itself modern. As soon as a new method of communication, multiplication, expression or realization of a work is invented, and as soon as the civilized countries recognize in their domestic laws some rights of the authors in connection with these new methods, the recognition of the

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46/ See, Report of the Rapporteur-General, in RECORDS (1952) 74; B.G. Crewe, "National Treatment as the Basis for a Universal Copyright Convention," in 3 UNESCO Copyright Bull. 3, 6 (#1, 1950). As the late copyright expert Samuel Tannenbaum explained:

> The fundamental object of the convention is the establishment of a comparatively simple system, providing minimum requirements which will afford equal treatment to an author of one member state seeking protection in the other member states. Implicit in the Convention is the intent not to create a uniform copyright statute, but rather to fuse the diverse domestic copyright systems into a simple workable international agreement, containing minimum formalities. S. Tannenbaum, "The Principle of 'National Treatment' and Works Protected: Articles I & II," in KUPFERMAN AND FONER, Universal Copyright Convention Analyzed 13, 16. [hereinafter UCC ANALYZED

> same right to works (to which the Convention applies) will become mandatory under the Convention, because otherwise the standards of "adequate and effective" protection would not be respected. 47/

As to the question of whether "adequate" and "effective" means one or two different but related, things, the record is not helpful. In its most ordinary sense, "adequate" and "effective" may well mean that copyright protection be both adequate in terms of the quantum of rights which must be accorded to authors and effective in that these rights are realizable through appropriate remedies and enforcement machinery. More likely "adequate and effective protection" is a single concept which need not be parsed and its use in the UCC can be explained by negotiating circumstances going more to form than substance. 48/ One thing is sure: implicit in the standard, particularly in light of the obligation to provide "national treatment," is the

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47/ BOGSCH, UCC 6 (1968).

48/ Certain delegations sought an illustrative enumeration of exclusive rights with would be a minimum level of protection accorded works under the convention. Report of the Rapporteur-General, in RECORDS (1952) 74. The difficulty in agreeing upon minima tended to focus negotiating efforts toward a more general formulation of Article I obligations. UNESCO first proposed an obligation "to take legislative or other measures for the effective protection of the rights of authors...." Working document DA/2 Draft, in RECORDS (1952), at 334. Different formulations included language such as "all measures necessary," "effective and sufficient." The Drafting Committee finally hit upon "adequate and effective," probably because most delegates agreed with the United States: "The fundamental purpose of the Convention was to lay down certain minimum criteria and the notion of "effective protection" must be given a practical interpretation. The issue of legal precedent was not important, since protection was a matter of good faith as between the signatory states." RECORDS (1952) at 132. Only Israel and Cuba appeared puzzled by the meaning of "effective and sufficient" as proposed by France. The two delegations found the words lacked "juridical meaning." RECORDS (1952) at 137.

The ambiguities inherent in the requirement to accord "adequate and effective" protection were perhaps not fully resolved by the decision of the Conference to reflect their understanding in the Report: "The President indicated that it was considered that these rights should include those given to authors by civilized countries...." RECORDS (1952), at 74.

expectation that rights and their means of exercise will vary to some degree from state to state, and that the limits of such variations is determined by reference to the laws of UCC states and the express minima of the Convention itself.

The UCC: Minimum Rights

Article V of the 1952 text of the UCC expressly recognized only one minimum exclusive right: that of the author to make and publish translations of works protected under the Convention, or to authorize them. Recognition of this exclusive right was not the product of a consensus wholly in favor of unqualified protection, but rather the basis for the introduction of certain limitations on the translation right which existed in previous treaties and in the legislation of many countries. 49/

When the UCC was amended in 1971 further minimum rights were written into Article IV bis of the Convention:

> 1. ... the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting. The provisions of this Article shall extend to works protected under this Convention either in their original form or in any form recognizably derived from the original.
>
> 2. However, any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention, to the rights mentioned in paragraph 1 of this Article. Any State whose legislation so provides shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made.

49/ An extremely interesting analysis of translation rights in international copyright conventions, written as part of the early work on the UCC, is found in Professor A. El-Tanambi's, "The Right of Translation and the Public Interest," 3 UNESCO Copyright Bull. 88 (#1, 1950). The Third Committee of Experts meeting outlined an approach to translation rights in the U.C.C. essentially accepted in Article V of the Convention. RECOMMENDATIONS OF THE COMMITTEE OF EXPERTS, in 3 UNESCO Copyright Bull. 11 (#3-4, 1950).

These provisions further elaborate the content of "adequate and effective" protection. The 1971 UCC Revision Conference expressed its understanding of these new rights through the Rapporteur-General, particularly in relation to the exceptions contemplated in Article IV bis and the regimes in favor of developing countries:

> First, that the exceptions referred to in Art. IV bis (2), insofar as the "spirit" of the Convention is concerned, includes the convictions expressed in the Universal Declaration of Human Rights: "that everyone has a right freely to participate in the cultural life of the Community," and that everyone equally has a right "to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."
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> Second, that inclusion of special compulsory licenses for developing states meant, a contrario, that such systems or other generalized compulsory licensing systems may not be instituted by developed countries.
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> And, third, that where exceptions are made to copyright protection under the terms of Article IV bis (2) "no state would be entitled to withhold entirely all rights with respect to reproduction, public performance or broadcasting, that where exceptions are made they must have a logical

basis and must not be applied arbitrarily, and that the protection offered must be effectively enforced by the laws of the Contracting States." 50/

The UCC: Formalities and Other Key Provisions

Article III of the UCC provides a simple means to satisfy copyright formalities which may exist in Contracting States:

. All UCC states whose domestic law provides for compliance with formalities as a condition of copyright, agree to regard these formalities as satisfied when a work of a foreign UCC national is first published with a special copyright notice, a "c" in a circle, the name of the copyright proprietor, and the year/date of first publication on all copies issued to the public; 51/

. To the extent that a UCC state has procedural requirements for the bringing of a copyright infringement action or other judicial relief, these requirements may be maintained on a non-discriminatory basis, notwithstanding the proper use by a copyright claimant of the UCC form of notice; 52/

50/ Records of the Conference for Revision of the Universal Copyright Convention, Paris, July 5-25, 1971, at 67 [hereinafter, RECORDS (1971)]. Notwithstanding the express mention of specific rights in the 1971 text of the UCC, The Report of the Conference stressed that:

> A fundamental point of interpretation of the 1971 Convention was referred to several times during the Conference, in connection with Article IVbis and in several other contexts. The Conference agreed the general aim of the 1971 Convention should be that no State that is now party to the Universal Copyright Convention of 1952, and that now respects the fundamental rights of authors, should be required to make any changes in its domestic law as a condition to adhering to the 1971 Convention. Under the new Convention, developing countries would, of course, have an opportunity to introduce compulsory licensing systems in accordance with Articles Vter and Vquater, but it was understood that no country now meeting the obligations of the 1952 Convention and according basic copyright protection would be required to assume new obligations in order to adhere to the 1971 Convention. Id., at 66.

51/ UCC, Article III (1)

52/ UCC, Article III (3).

. States which grant copyright for more than one term of protection (as did the United States under the 1909 copyright law) can continue to impose second term formalities upon UCC works, so long as the first term is at least as long as the minimum duration prescribed by the UCC itself. 53/

Use of the UCC form of copyright notice by American authors satisfies both domestic notice requirements and formalities which exist in a number of foreign states. The UCC form of notice, however, satisfies only those formalities which are conditions of copyright; the continued application of deposit systems, censorship, and customs formalities are not affected by the UCC so long as they are not sanctioned by a denial or loss of copyright

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53/ UCC, Article III (5). This provision is complemented by a regime allowing a cut-back in the term of protection accorded works originating in a two-term UCC state (such as the United States), by imposing a requirement of compliance with second term formalities in the country of origin as a condition of protection in other UCC states. UCC, Article 4(4)(b).

protection. 54/ Nevertheless, the use of the Convention notice provides at least some protection against the application of formalities in a broadly obstructive way to the mass of American copyrighted materials. 55/

Article IV of the UCC provides for a minimum term of protection: basically, either the life of the author plus twenty-five years post mortem or, where term is calculated from a date of first publication, twenty-five years from such publication. 56/ In addition, the UCC sanctions the so-called

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54/ "The 'requirements' which shall be regarded 'as satisfied' are formalities required 'as a condition of copyright.' These are the formalities which, if not fulfilled, prevent the acquisition of copyright or result in the loss of the once acquired copyright before the expiration of the applicable term. Other kinds of formalities such as deposit for the purposes of enriching the national libraries. .... or for the purposes of censorship, customs, or other 'administrative' formalities, are not satisfied by use of the Convention notice as long as they are not sanctioned by the denial or loss of copyright protection....

'Condition of copyright' may refer to the totality of copyright or to certain rights embraced therein. Thus, for example, the requirement of the Argentine Law according to which the protection of the right of translation -- and this alone -- depends on the fulfillment of certain formalities, is a requirement satisfiable by the Convention notice even though all other rights embraced in copyright would be protected without the Convention notice. BOGSCH, UCC, at 34.

It is worth noting that with the enactment of the 1976 Copyright Act, neither a failure to register claims to copyright, nor a refusal to deposit works bearing a copyright notice with the Library of Congress are sanctioned by a loss of copyright. These changes from the former copyright law have deprived the Article III notice of its legal effects, exposing foreign and domestic authors alike to our copyright law's deposit requirements in particular. 17 USC §407, 408; H.R. Rept. 94-1476, at 150.

55/ BOGSCH, UCC, 34-36.

56/ UCC, Article IV (2). The general rule is that the term of protection of a work is governed by the law of the UCC state where protection is sought, subject to the minimum period prescribed in Article IV. UCC, Article IV (1).

"rule of the shorter term" whereby states are not obligated to protect a work for a period longer than that provided by the law of the country of origin for the class of works involved. 57/ This provision is the only one in which resort to material reciprocity may be had under the UCC; it was intended to reduce durational inequities arising between states party to the both the Berne and Universal Conventions, and those party only to the UCC.

Two other aspects of the UCC deserve special attention: (1) the collaborative structure envisioned by the Convention to respond to problems arising under the UCC; and (2) the regime adopted in the 1971 text in favor of developing countries.

Activities of the UCC Intergovernmental Copyright Committee

Article XI of the 1971 UCC creates an Intergovernmental Committee (IGC) composed of eighteen member states. Selected with "due consideration to a fair balance of national interests on the basis of geographic location, population, languages and state of development, the Committee has the following duties: 1) to prepare for revision conferences; 2) to study problems of international copyright protection; 3) to study "problems concerning the application and operation of the UCC"; and 4) to inform UCC states of the Committee's activities. 58/

57/ UCC, Article IV (4). For more than you want to know about this subject, See, Ringer and Flacks, "Applicability of the Universal Copyright Convention to Certain Works in the Public Domain in their Country of Origin." 27 Bull. Copyr. Soc. 157 (Feb., 1980).

58/ The Intergovernmental Committee of the UCC was established in 1952 with 12 seats. In 1971 it was expanded to 18 seats in order to permit greater representation of developing countries on the Committee.

Since its inception, the IGC has considered a variety of issues arising under the Convention including: proper placement of the Article III copyright notice; implementation of the rule of the shorter term; ways to promote the wider acceptance of the Convention and to create greater knowledge about the world's varied copyright laws; and specific copyright-related issues such as neighboring rights, double taxation of authors' royalties, the protection of material expressions of folklore, domaine public payant, commercial lending rights, off-air recording for educational uses, cable television, private copying, and piracy.

Since 1958, the IGC has held its meetings jointly with the Executive Committee of the Berne Union. Although the Berne Executive and UCC intergovernmental committees do consider separately matters of importance to only one or the other Convention, the great bulk of substantive copyright questions are discussed jointly, although obviously in light of the respective texts of the two Conventions.

Very early in the history of the IGC, the problem of how to deal with inadequate copyright protection in UCC states emerged. The first three sessions of the IGC failed to achieve a consensus on a positive response to the general problem. By the Fourth Session, all efforts to mobilize the deliberative body into an enforcement role -- even if only through moral suasion -- had effectively been abandoned. Unwilling to intervene in particular private copyright disputes and lacking a basis to identify national trends amounting to denials of "adequate and effective" protection, the IGC adopted

an essentially neutral stance in such matters. 59/ The recent decision of UNESCO to examine the causes and consequences of piracy is the first opportunity to examine systematic denial of UCC rights since the mid-1950's.

Article XV acknowledges only one means by which violations of Convention obligations may be enforced:

59/ At the first session of the Intergovernmental Committee, the delegation of Spain "drew the Committee's attention to the problem of pirated editions of Spanish books in certain Spanish-speaking countries." Apparently resort by Spain to the Committee was due to the absence of diplomatic relations between Spain and these countries. Summary Records, First Session, Intergovernmental Copyright Committee, Paris, June, 1956, in, 9 UNESCO Copyright Bulletin 213 (#2, 1956). Although the Committee was sympathetic to the general problem of assuring the good faith implementation of the Convention, "the unanimous opinion was that neither the Committee nor its Secretariat could make inquiries concerning specific infringements committed by individuals." Report of the Second Session of the Intergovernmental Committee, Washington, D.C., October 7-11, 1957, in 10 UNESCO Copyright Bulletin 217 (#2, 1957). Nonetheless, Spain, now supported by France, sought to develop a survey or report on infringement cases brought before national courts "without satisfaction being obtained" and, more interestingly, infringements which, in light of the UCC, "reveal a trend toward systematic non-application of the provisions of the Convention and threaten its operation." Id. The effort petered out. Interestingly enough, the Secretariat did consult with states on the compatibility of domestic law with UCC provisions having no direct relationship to piracy. Account of the Proceedings, Fifth Session of the Intergovernmental Committee, London, October 31-November 4, 1960, in 14 UNESCO Copyright Bulletin 14 (#1, 1961).

> A dispute between two or more Contracting States concerning the interpretation or application of this Convention not settled by negotiation, shall, unless the States concerned agree on some other method of settlement, be brought before the International Court of Justice for determination by it.

The UCC and Copyright in Developing Countries

As in the United Nations itself, the UCC has in recent years received more and more Third World Countries into its membership. As the proportion of Third World countries grew in the 1950's and 1960's, so did their demands for alteration of the UCC to create for their benefit certain exceptions to authors' exclusive rights, largely where protected works were to be used in aid of education and more general development programs. The compulsory licensing provisions of the 1971 UCC text were the subject of intense debate and compromise and represent a response to these demands.

Under Article IV bis of the 1971 UCC text, "any Contracting State regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations" is authorized to declare its intention to apply, as part of its copyright law, several exceptions set out in the Convention. 60/ To do so, developing countries must notify UNESCO of their

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60/ The introduction into the UCC of special compulsory licensing regimes which developing countries could apply to translation and reprint rights is the product of a wrenching and potentially destructive confrontation between industrialized and developing nations party to the Berne and Universal Copyright Conventions. In the early 1960's key developing countries signalled their intentions to seek special concessions at the next revision of the Berne Convention. At the Stockholm Conference in 1967, developing countries secured the adoption of a Special Protocol which would be an integral part of ratification of the new text of Berne as a whole. The sweeping limitations upon copyright in the Protocol went too far for most developed states; the 1967 Stockholm revision of Berne was doomed to non-acceptance.

The history of how the UCC became embroiled in this confrontation has been well-recounted elsewhere. E.D. O'Hara, "Developing Countries": A Definitional Exercise," 15 Bull. Copyright Soc. 83 (Dec., 1967); N. Tocups, "The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries, 29 J. Copyr. Soc. 402 (April,

intention; and , such notifications are effective for ten-year periods, renewable until the state concerned is no longer regarded as a developing country. 61/

The exceptions which are permitted fall into three categories:

1. Translation Rights Subject of Compulsory Licensing
The UCC has always contained a provision permitting all contracting States to limit exclusive translation rights to a period of seven years following first publication of a work. If, after that period has elapsed, an authorized translation has not been published in a language in general use in a UCC state, a limited, non-exclusive license to translate may be issued to a national by the competent authority of his or her country. For developing countries, the 1971 UCC text reduces this period of complete exclusivity to three years from first publication of a work. Further, if the language into which a work is being translated in a developing country is one not in general use in a developed country party to the UCC, the period of exclusivity may be reduced to one year. 62/

2. Reprint Rights Subject to Compulsory Licensing
Compulsory licensing of reprint rights of particular edition of a work in its original language in developing countries is specifically permitted so long as, during specified periods of time following first publication of the work, "copies of such edition have not been distributed in that

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1982); D. Schrader, "Analysis of the Protocol Regarding Developing Countries," 17 Bull. Copy. Soc. 160 (Feb., 1970) and Ms. Schrader's other foray into the controversy, whose title catches the tenor of the conflicts, D. Schrader, "Armageddon in International Copyright: Review of the Berne Convention, the Universal Convention and the Present Crisis in International Copyright," 2 Advances in Librarianship 305 (1971).

In 1971, following meetings of the Conventions' Committees in Washington, the Stockholm Protocol was, in effect, "renegotiated" and the compromise embodied in the Universal and Berne Conventions. A confrontation between newly independent nations and their former colonial masters, centering around a treaty to which the United States did not adhere, was resolved largely because of the persistence and imagination of the United States. Though still controversial, the 1971 revisions of the UCC represent a significant achievement for United States copyright diplomacy.

61/ UCC, Article V bis (2).

62/ The limitation on exclusive translation rights available to all UCC states is in Article 5 of the Convention; those for developing countries, in Article 5 ter.

State to the general public or in connection with systematic instructional activities at a price reasonably related to that normally charged in the State for comparable works." The minimum periods of exclusivity for copyright owners is computed from the date of first publication, is fixed at (a) five years in general; (b) three years for works of the natural or physical sciences and similar technical works; and (c) seven years for fiction, poetry, music, art books and similar works. 63/

3. Compulsory Licensing in General

In all cases, prospective compulsory licensees in developing countries are required to make good faith efforts to secure a voluntary license from the copyright holder. A prerequisite to eligibility for a non-exclusive compulsory license under the UCC system is a demonstration by the applicant that a license was sought and denied, or that the copyright owner could not, after due diligence, be located. Further, the copyright holder always retains the power to terminate the applicant's compulsory license by bringing out a comparable edition in the territory concerned. As a general rule, licenses issued under the terms of the UCC's exceptions for developing countries are valid only in the territory of the country of issuance; copies may not be exported to third markets. 64/

The compulsory licensing regimes neither displace the market, nor the pre-eminence of voluntary licensing as the preferred way of doing business. They tend more to affect the respective bargaining positions of a developing-country licensee and a developed country licensor rather than to vitiate completely the principle of voluntary contract as the means of exercising proprietary rights.

An integral part of the 1971 compromise was the creation of an international center where interested users might obtain information concerning the availability of works for licensing to developing countries at rates hoped to be preferential. Initially, this "clearing-house" was established in UNESCO, as the International Copyright Information Center. In 1980, WIPO and UNESCO

63/ UCC, Article 5 quarter.

64/ UCC, Article V ter 1 (c), (6); Article V quarter (1)(a), (2) (c).

agreed to share the informational and other evolving functions of the Center under a Joint International Copyright Information Service, which came into being in 1981. The Service is advised by a Consultative Committee, whose membership is drawn generally from the fields of education and publishing, on a world-wide basis. 65/

In addition to the formation of the Service, the thrust of UNESCO/WIPO activities in meeting the needs of developing countries has been one of cross-education, information dissemination and technical legal assistance. In meeting these objectives WIPO and UNESCO have developed the following programs, carried out from 1972 to the present:

1. Preparing model contracts for licensing works in developing countries;

65/ The Joint International Copyright Information Service is a reaction to the complaints of developing countries over the difficulties in securing licenses to utilize the protected works of authors and publishers of developed states. It was created in large part upon the initiative of the United States at the International Copyright Joint Study Group which met in Washington to seek a compromise to the Stockholm Protocol crisis. Note of the United States to UNESCO, May 20, 1969, "Copyright and the Developing Nations," reproduced as Conference Document UNESCO/BIRPI/SGC-1/3, annex B, at 9.

To the United States, the Service was to be a form of "clearinghouse" whose goals were 1) "to provide simple, effective, and realistic help to publishers in developing countries in solving their practical problems of copyright clearance; 2) that it be "passive," rather than "active" (that is, it functions as an information resource, rather than an "agent," "as a beginning." Id., at 17. As the United States noted:

"Basically, the clearing house should be a voluntary arrangement under which authors and publishers would make blocs of copyrighted works more readily accessible for certain kinds of uses and on preferential terms in developing countries. No authors or publishers would be compelled to make any of their works a part of the system but, once they had chosen to do so, they would be bound by certain obligations." Id., 18

The idea of a service was generally supported by the International Literary and Artistic Association, but only cautiously by other interested non-governmental organizations. United States publishers participation in the Service's programs remains limited today, largely because of the fear that the Service may be moving to a more "active," agency-style role.

2. Encouraging the growth of national or regional copyright information centers to facilitate effective licensing;

3. Periodically attempting (without much practical success) to assess the experience of states under the revised UCC, as it relates to transfers of rights to developing countries;

4. Providing legal information and assistance to states in the analysis of copyright issues, the preparation of national copyright laws or regulations, or any other national matter bearing upon the international protection of copyrightable works;

5. Establishing internships or fellowships under which copyright officials of developing countries may visit developed countries in order to become familiar with the copyright laws and policies of these countries as well as the practical ways in which their copyright owners conclude licenses for the use of protected works;

6. Preparing international recommendations or documents which provide guidance on the implementation of the two conventions' compulsory licensing regimes; and,

7. Establishing recommendations as to the steps which developed country rights holders should take to effectively make works available to developing countries.

Although there has been dissatisfaction with some of the products of these programs, the programs themselves are useful in terms of long range copyright law development. It is clearly in the interests of the United States and other copyright exporting countries that expert advice be available to developing countries. Further, the very process of preparing international model instruments illuminate the expectations and needs of both copyright owners and users.

The acceptance and scrupulous implementation by developing countries of the special provisions may ultimately serve the cause of promoting reasonable copyright systems in the Third World. Compliance with the procedures required as a prerequisite to implementation of compulsory licenses must lead to greater contacts and exchanges of views between United States licensors and Third World licensees. (Here we mention only parenthetically a point more

fully developed hereinafter: American copyright owners, as well as those from other countries, can advance their own interests, as well as authorship and publishing generally, by energetically moving to bring their works to the less developed countries timely and at prices realistic for the particular market, whether by shipment or by licensing.) The special provisions also remove the basis for complaints that the copyright system is unresponsive to developmental needs and an impediment to national development. Copyright owners tend to be leary of compulsory licenses in any context. By their nature they deprive copyright owners of control, and substitute a right of compensation at rates set by someone else. But the crucial point is that these compulsory licenses are now embedded both in the UCC and the Berne Convention and are regarded by developing nations as necessary for their protection. In sum, the compulsory licenses can be regarded as a price for inclusion of Third World countries in an international regime which can develop further copyright institutions in those countries.

Finally, in the years ahead, developing an international consensus on the progressive modernization of copyright to take account of new technologies of creation and exploitation will place heavy political demands upon the UNESCO and WIPO and all of the states that participate in their copyright treaties. If the problems of direct broadcast satellites, home video rights, piracy, computer software protection, cable television and satellite signal "poaching" are to be reconciled at the international level, some success in meeting the "copyright agenda" of the Third World is desirable, if not essential. The compulsory licensing regimes are a central part of that agenda. More broadly, they are part of a total approach to the issue of facilitating transfers of rights to developing countries by a number of copyright industries. Any effort to strengthen the position of United States copyright holders abroad --

to secure "adequate and effective" protection -- must address the fundamental international copyright perspectives of the Third World wherein the need for copyright modernization and strengthening of enforcement procedures is most urgent.

Inter-American Copyright Agreements

In addition to the UCC, the United States is signatory to a number of other multilateral copyright arrangements loosely described as Interamerican Conventions. These include the Mexico City Copyright Convention (1902) and, the Buenos Aires Copyright Convention (1910). 66/ While some of these conventions remain important to a number of Latin American states, the two Conventions to which the United States adheres have been largely superseded by the wide adoption in our Hemisphere of the UCC. Thus, for some time, the Mexico City Convention served as the basis of our copyright relations only with El Salvador; and, for prospective purposes, was superseded by El Salvador's adherence to the UCC in 1979.

Adhered to by 13 nations, the Buenos Aires Convention is solely concerned with the rights of American authors in the Americas. 67/ Although its general description of the subject matter of protection under the Convention is probably broad enough to include motion pictures, they are not specifically

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66/ There have been seven inter-American copyright conventions: The Montevideo Copyright Convention (1889), Mexico City Copyright Convention (1902), Rio de Janeiro Copyright Convention (1906), Buenos Aires Copyright Convention (1910), The Caracas Copyright Agreement (1911), Havana Copyright Convention (1928), and the Washington Copyright Convention (1946). The adoption of the Washington Convention by fifteen Latin American republics, but not the United States, has essentially mooted the Buenos Aires Convention in the Americas, except insofar as relations with the United States are concerned. The texts of Inter-American Copyright Treaties are all reproduced in CLTW.

67/ Art. 7, Buenos Aires Convention (1910), reprinted in CLTW, Item 1: Buenos Aires Convention (1910).

mentioned; nor is it surprising that many other contemporary modes of creating and exploiting works are not mentioned. Further, the conditions for protection in member states involve protection in the country of origin and an imprecise copyright notice requirement. 68/ Surprisingly, there are no provisions establishing a basis for protection of unpublished works. 69/

The Buenos Aires Convention retains some vitality insofar as copyright protection for pre-UCC works, but as time passes, more of the pre-UCC works pass into the public domain, and the number of "live" pre-UCC works diminishes, that vitality will also abate. Until recently, the Buenos Aires Convention also served as the principal basis for our eligibility for United States copyright protection in Bolivia and the Dominican Republic. With the accession recently of the Dominican Republic to the UCC, this list has been reduced to but one Latin American nation. Recently the Buenos Aires Convention did, however, assume importance in efforts to bring under control the systematic infringement of copyright in texts and other educational materials by nationals of the Dominican Republic. 70/

The Convention for the Protection of Performers, Producers and Broadcasting Organizations

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68/ Id., Article 3, which provides:

> The acknowledgement of a copyright obtained in one State, in conformity with its laws, shall produce its effects of full right, in all the other States, without the necessity of complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the property right.

69/ This curious situation is discussed in, H. Henn, "Inter-relation Between the Universal Copyright Convention and the Pan-American Copyright Conventions," in UCC ANALYZED 133 (1955).

70/ See, infra, at p. 111.

The Convention for the Protection of Performers, Producers, and Broadcasting Organizations, the so-called Rome Convention of 1961, is not, strictly speaking, a "copyright" agreement. Rather, it is called a "neighboring rights" treaty. "Neighboring rights" are:

> Usually understood as meaning rights granted in an increasing number of countries to protect the interests of performers, producers of phonograms and broadcasting organizations in relation to their activities in connection with the public use of authors' works, all kinds of artists' presentations or the communication to the public of events, information, and any sounds or images. The most important categories are: the right of performers to prevent fixation and direct broadcasting or communication to the public of their performances without their consent; the right of producers of phonograms to authorize or prohibit reproduction of their phonograms and the import and distribution of unauthorized duplicates thereof; the right of broadcasting organizations to authorize or prohibit rebroadcasting, fixation and reproduction of their broadcasts. An increasing number of countries already protect some or all of these rights by appropriate rules, codified mainly within the framework of their copyright laws. Several countries also grant a sort of moral right to performers. Some countries are also prepared to protect the interests of broadcasting organizations to the extent of preventing the distribution on or from their territory of any programme-carrying signal by a distributor for whom the signal emitted to or passing through a satellite is not intended. No protection of any neighboring right can be interpreted as limiting or prejudicing the protection secured to authors or beneficiaries of other neighboring rights under a national law or an international convention. 71/

The idea of protecting certain kinds of creative endeavour by a system of private rights, less than full copyright, arose in response to technology:

> Up to the end of the last century, the artists' offerings (actors in a play, operatic and concert singers, musicians playing pieces of music, circus and variety artists doing their turns, etc.) had an ephemeral character. They disappeared at the moment they were seen or heard. After the play or the concert was over, nothing was left except the impression created in the memory of the audience. In a very few cases someone made a sketch of a scene, a soloist, an orchestra or an acrobat, or perhaps a photograph of an

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71/ WIPO, GLOSSARY OF TERMS OF THE LAW OF COPYRIGHT AND NEIGHBORING RIGHTS 167 (Geneva, 1980) [hereinafter WIPO GLOSSARY]

> event to jog the public's memory. But people had to be present where the event took place in order to appreciate it. The invention of the gramophone, cinematography and radio, and the spread to an ever-wider public at the beginning of the 20th century, revolutionized the ways in which authors were able to publicize their work. But since these means of communication, ever-improving, bore mainly on the offerings of performers, it was the latter who were most affected and became prior claimants to a grant of neighboring rights. 72/

The detail and difficulty of the Rome Convention derives not only from its concern with complex technologies, but as well from the need to reconcile the somewhat conflicting economic demands of each "neighboring rights beneficiary." Added to this was the fact that, in order to gain acceptance, the Rome Convention could not prejudice the rights of authors of works with respect to their use by neighboring rights beneficiaries or by other parties. 73/

The United States has not adhered to the Rome Convention for a number of reasons -- some economic, others in the nature of self-interest. Nonetheless, it is, in the long term, of considerable interest to United States copyright-exporting industries whether other nations accept the Rome Convention or move otherwise to protect sound recordings. Because the basis of eligibility for the protection of foreign sound recordings can be affected by the style of domestic protection accorded such works, attention must be

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72/ WIPO, GUIDE TO THE ROME CONVENTION AND TO THE PHONOGRAMS CONVENTIONS 9 (1981). [hereinafter ROME GUIDE]

73/ Article I of the Rome Convention provides:

> Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.

Claude Masouye has again provided an excellent and clear commentary on the tensions between copyright and neighboring rights holders in, ROME GUIDE 16-18. The text of the Rome Convention appears in CLTW.

carefully paid to the growth of the Rome Convention and the acceptance at national levels of the principles of protection upon which it is founded. 74/ The Rome Convention also is valuable in assessing ways to respond to challenges to the livelihoods of performers posed by the new technologies of our age.

74/ Twenty-five or so states are party to the Rome Convention. Although United States broadcasting, motion picture and sound recording industries have not traditionally favored United States adherence to Rome, the unsettled or incomplete international protection for sound recordings and performers suggests the usefulness of a re-examination of the public interest in this matter. The ability of copyright law to respond equitably to technologic distortions of broadcasters' commercial practices, of sound recording distribution and performance licensing has been questioned on all sides; nevertheless, an analysis of neighboring rights as a "lower-level" solution to problems in reconciling intellectual property requirements with the interests of consumers and labor has received scant attention. The situation of performers had largely been ignored. As to this latter class, the former Register of Copyrights, Barbara Ringer, has observed:

> The communications revolution of the twentieth century devastated the performing arts as a livelihood. Every new development restructured the means by which performances reached the public and forced more and more live performers into other professions. As each new invention or advancement came into use, the impact on performers was two-fold:
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> (a) Performers by the thousands lost their jobs. Faced with having to compete with their own or others' recorded performances, performers in vaudeville, movie theatres and radio stations, among others, were forced into unemployment, and into part-time and full-time employment in other fields;
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> (b) Among those performers who remained, many found work as recording musicians. But they soon discovered that they had lost control over the value of their performances, which could be used over and over again with profit to others but not to them. When a performer's recording could displace that performer's live performance, a time payment was not enough.
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> Bad as these two effects were separately, the efforts to cure them were bound to come into conflict. Attempts to help live performers proved detrimental to recording performers and their rights, and produced explosive conflicts within the unions that are still felt today. B. Ringer, "Copyright in the United States," in S. STEWART, INTERNATIONAL COPYRIGHT 20-21 (Butterworth: 1984)

The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms

Two other intellectual property convention treaties -- the Geneva Phonograms Convention (1972) and the Brussels Satellite Convention (1974) 75/ -- are not strictly copyright or neighboring rights agreements. Instead, they are specific public international law responses to two very particular problems: record and tape piracy and satellite signal "poaching." Although remedies to both problems were arguably already available under the Rome Convention, that convention was not widely accepted. An even greater impediment was the Rome Convention requirement that members also adhere to either the UCC or Berne Conventions; piracy and signal poaching were emerging problems of the first magnitude, including in states not party to either copyright treaty.

Under the Convention for the Protection Producers of Phonograms Against Unauthorized Duplication of their Phonograms -- commonly referred to as "the Phonograms Convention," Contracting States are obliged to protect producers of phonograms who are nationals of other contracting states "against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public." 76/

There are several obvious differences between the Phonograms Convention and the typical copyright agreement. First, in addition to the common copyright treaty criteria of nationality the Phonograms Convention provides

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75/ Texts of both Conventions are reprinted in CLTW.

76/ Article 2, Convention for the Protection of Producers of Phonograms Against Unauthorized Implication of their Phonograms, CLTW: Phonograms Convention: Item 1. [hereinafter Phonograms Convention.].

another point of attachment for protection: the place of first fixation of a phonogram. 77/ Second, the Convention obligation is directed specifically to foreign sound recording producers. Thus, unlike the Berne and Universal Copyright Conventions, the obligation to protect Convention subject matter is not based upon national treatment. Under the Phonograms Convention it is theoretically possible for a contracting state to protect the sound recordings of foreign producers without protecting the recordings of domestic producers. 78/

Further, the Phonograms Convention does not purport to regulate all of the intellectual property relationships concerned with the production and exploitation of sound recordings. The only right protected under the Phonograms Convention is that most intimately involved with commercial record and tape piracy: reproduction for public distribution. The importation into a contracting state of piratical copies of phonograms as the personal property of a traveler is not proscribed; neither is the private reproduction of sound recordings in the homes of nationals of contracting states. Also excluded are rights of public performance,and the right to prepare derivative works --which under copyright or neighboring rights regimes are among the most important.

It is, however, in Article III that the non-intellectual property character of the Convention is most sharply revealed:

> The means by which this Convention is implemented shall be a matter for the domestic law of each Contracting States and shall include one or more of the following: protection

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77/ Art. 7(4), Phonograms Convention.

78/ This result arises out of the literal wording of Article 2 of the Convention, which extends the obligation to protect to "producers of phonograms who are nationals of other Contracting States...." [emphasis added]. As Masouye correctly notes, however, "A state undertakes no obligations as to its own nationals, but, in practice, is most unlikely to treat them worse than foreigners." ROME GUIDE 99.

> by means of the grant of a copyright or other specific right; protection by means of the law relating to unfair competition; protection by means of penal sanctions. 79/

The Phonograms Convention contains several copyright-type provisions which establish the possibility of minimum terms of protection; a special notice requirement (drawn from the Rome Convention, which in turn drew upon the UCC); 80/ the possibility of exemptions and limitations 81/; and, of some practical importance, a non-retroactivity provision. 82/

If the Phonograms Convention was a swift effort to combat record and tape piracy, it is fair to ask whether it has succeeded in its ambitions, or at least helped stem the tide of world-wide sound recording piracy. As the next section of this report demonstrates, the record is less than satisfactory.

79/ Article 3, Phonogram Convention. Certain important phonogram-producing states, notably France, now protect phonograms under their law of unfair competition. As to the meaning of "unfair competition" in this context, Masouye notes:

> This is defined in Article 10bis of the Paris Convention for the Protection of Industrial Property as "any act of competition contrary to honest practices in industrial or commercial matters." The acts which Article 2 of the Phonograms Convention forbids generally speaking fall within this definition: the pirate dishonestly damages the legitimate producer by making and selling exact copies of his wares, often (since the pirates' costs are considerably less) at prices lower than usual. There is unfair competition too when the pirate deceives the public as to the true origin of the records, by passing off his goods as those of the legitimate producer. ROME GUIDE 101, See also, Summary Minutes of the Main Commission, in Records of the International Conference of States on the Protection of Phonograms, Geneva, October 18-29, 1971, at. 75-6.

80/ Phonograms Convention, Article 5. The "magic" symbol in the Phonograms Conventions" notice is a "P" in a circle, with the other elements of the more traditional copyright notice: the date of first publication and the name of the producer or other rights owner.

81/ Phonograms convention, Article 6.

82/ Id., Art. 7(3).

In assessing the record, it is appropriate to consider the overall place of the Geneva Phonograms Convention in the legal structure of United States sound recording protection abroad. The United States is a member of the Convention and it has been accepted in states where the recognition of copyright or neighboring rights is already secure, at least de jure. There are, even in these states, advantages to United States sound recording interests arising out of the adherence of industrialized states to the Phonograms Convention. Because not all states party to the UCC appear to be in accord on the question of whether the UCC may serve as a basis of eligibility for the protection of phonograms and the United States is not a member of the Rome Convention, membership in the Phonograms Convention has the effect of settling the question of our rightsholders' entitlement to protection of their sound recordings in some very important markets.

To the extent that the negotiators of the Phonograms Convention hoped to secure the adherence of states which had not yet matured to the point of international copyright recognition, it has not succeeded. Because sound recording piracy is still a problem in virtually every country, including the United States and other member states, it is difficult to appraise the material impact of the Phonograms Convention upon the piracy problem. If the figures offered by the International Federation of the Phonographic Industry (IFPC) are to be credited, however, then the level of sound recording piracy in Phonogram Convention states is materially lower than that found outside of the treaty's membership.

The Phonograms Convention has been most widely accepted in two regions: Europe and Latin America. Notwithstanding the fact that phonogram piracy is significant in both regions, it is clearly far less than that encountered in states such as Saudi Arabia, Nigeria and Singapore -- all of whom have not

subscribed to the Phonograms Convention. In addition, with the sole exception of India, every major center of world record and tape piracy has remained outside of the Phonograms Convention.

In the Western Hemisphere, the obligations incurred under the Phonograms Convention have been extended by the United Kingdom to its dependencies in the Caribbean. As more Caribbean nations become independent, however, it may be important to encourage these new nations to continue to apply the protection which United States sound recording interests have so far enjoyed under the Convention.

The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted By Satellite

As with the Phonograms Convention, the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974), the so-called Brussels Satellite Convention, was intended to attack an unintended consequence of the marvels of technology. The objective was first and foremost to suppress the theft and further distribution of materials transmitted by space satellites.

Efforts to develop an international instrument to protect the commercial integrity of programming delivered through space satellite signals began in the late 1960's. 83/ Although satellites were not then in wide use, their potential as a program distribution medium was sufficiently clear that film producers, broadcasters and music interests felt early action assuring some form of protection for this medium to be essential. Surveying intellectual property and telecommunications treaties then in existence, the affected

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83/ The preparatory meetings which led to the Brussels Conference are briefly summarized in C. Masouye, "A New International Convention," 25 E.B.U. Review 46 (#5, September 1974).

industries concluded that each had important defects. While the ITU Convention had relevant provisions assuring secrecy of communications, it lacked the necessary enforcement machinery to support this obligation. Neither the UCC nor Berne Conventions protected broadcasters or their broadcasts, casting doubt upon whether satellite signal transmissions would be treated any differently. Finally, although the Rome Convention arguably could extend to satellite transmissions intended for public distribution, the inapplicability of that Convention to cable rediffusion activities constituted a potential and unacceptable loophole in protection.

After three difficult preparatory meetings, an international consensus emerged to prepare a convention based not upon private rights, but upon public law. 84/ The object of protection in the new treaty would be a "program-carrying signal": it was "the container and not the contents" that were to be secured against interference by signal poachers.

84/ During the three preparatory meetings immediately proceeding the diplomatic conference, it became clear that a consensus could not be developed on the question of the form of protection to be applied to satellite signals. Masouye recalls:

> "...whereas the governmental experts were agreed in desiring a new international instrument of the simplest possible kind -- this being the prerequisite for any degree of universal acceptance -- there were two opposite approaches: either the treaty should confine itself to protecting broadcasting organizations against the risk of signal piracy, or it should grant this protection and at the same time confer on the contributors to the programmes carried by the signals an exclusive right to control the conditions for satellite transmission of their works or performances.
>
> A solution was found at Nairobi in 1973, where the Preparatory Committee deliberately departed from the field of private international law and chose a formulation for the new international instrument in gestation which places it exclusively in the context of public international law....[T]he Nairobi draft merely calls upon Contracting States to assume the obligation to take all adequate measures to prevent the distribution on their territory of satellite-transmitted signals by distributors for whom these signals are not intended. There was no further question of granting, internationally, exclusive rights of authorization to the broadcasting organizations originating the programmes or -- in consequence -- to the contributors to those programmes, all of which was made a matter either for national legislation or for contractual negotiations. Rightly or wrongly -- once again, only time will tell --this new philosophy was considered to be the one deserving wides support." Id., at 48.

A detailed comparison of the conflicting or varying approaches to the proposed treaty appears in Report of the Rapporteur-General, International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Space Satellite, UNESCO/WIPO/CONFSAT/42, at para. 54.

The approach of the Brussels Satellite Con tion is similar to that of Geneva Phonograms Convention contracting states are obligated

> ... to take adequate measures to prevent the distribution on or from its territory of any program-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended. 85/

This obligation applies "where the originating organization is a national of another Contracting State and where the signal distributed is a derived signal." 86/ The Convention is intended to secure program-carrying satellite signals from unauthorized interception and distribution at all points of transmission: (1) its upleg; (2) while "in" the satellite; and (3) on its downleg for ultimate, intended, distribution. 87/ The Convention's obligations generally cease to apply to unauthorized distributions subsequent to the authorized terrestrial distribution of a satellite derived signal. 88/

85/ Article 2, Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite, CLTW, Satellite Convention Item E-2 [hereinafter, SATELLITE CONVENTION].

86/ Id.

87 / This result is derived from the definitions of "signal," emitted signal," and "derived signal" in Article I of the Convention. A careful textual exegesis of the Convention, particularly as to its definitions, is R. Dittrich, "The Brussels Satellite Convention," 25 E.B.U. Review 60 (#6, November 1974).

88/ Article 2(3), SATELLITE CONVENTION. As noted in the Report of the Conference:

> The basic idea behind Article 2(3) is that the Convention is intended to deal primarily with space communications, and should not cover situations that are essentially terrestrial. Thus, where an unintended distributor derives the signals he is distributing from another terrestrial distributor at the end of a chain of terrestrial distribution, and at least one of the distributors further emitted through a satellite would not make the Convention applicable. This is a case of rebroadcasting, fully covered by the Rome Convention, and it was felt by the preparatory Committees that the new treaty should not also attempt to cover this same terrestrial ground. Report of the General Rapporteur, International Conference of States on the Dis-

The Convention leaves each state free to choose its own method of implementation including the specific beneficiaries of protection. 89/ The Conference Report acknowledges that implementation could be on the basis of private rights (including neighboring rights and/or copyright), penal sanctions, administrative regulations, or any combination of such regimes. 90/ As with the Phonograms Convention, the key obligation is to prevent a fairly well-defined wrong. How to right that wrong is a matter of discretion.

The Brussels Satellite Convention, however, does not apply to all possible types of satellite signal distributions. By the express terms of Article III, the Convention does not apply to signals which "are intended for direct reception from the satellite by the general public." The exclusion of such "broadcast" satellite signals was necessary and desirable: These transmissions should already be regulated under the copyright or neighboring rights regimes of most civilized states which must necessarily deal with the question of public performance of protected works by broadcasting. 91/

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tribution of Program-Carrying Signals Transmitted by Satellite, Brussels, May 6-21, 1974, UNESCO/WIPO/CONFSAT/42, para. 100.

89/ States discretion is implied in the working of the Article 2 obligation itself: "...undertakes to take adequate measures." (emphasis added).

90/ Report of the General Rapporteur, op. cit, note 103, at para. 79.

91/ An important caveat to the rule which excludes direct-broadcast-satellite (DBS) signals from the scope of the Convention is that unauthorized distribution of a point-to-point satellite signal by DBS would be a proscribed transaction under the Convention. As to the general applicability of infringements of public performance rights under the copyright laws of states, Dr. Dittrich answers one part of the question:

> It should be added in this connection that -- to my mind -- a broadcasting organization using a direct broadcast satellite remains liable to respect copyright legislation in the wider sense vis-a-vis authors, performers, producers of phonograms, photographers and/or other broadcasting organizations and cannot claim that transmission takes place in space and therefore does not fall within the purview of

The Convention contains provisions governing retroactivity [92], the possibility of reservations in relation to cable television [93], minimum terms of protection [94] and possible exemptions or limitations upon protection. [95] These exemptions or limitations deserve brief mention because their presence had evoked considerable controversy and seemed to impede United States ratification of the Convention.

Article IV provides that the unauthorized distribution of a satellite signal on the territory of a Contracting State need not be proscribed in the following cases:

1. where short excerpts of the "program carried by the emitted signal" consist of "reports of current events" and the use of such excerpts is warranted by informational purposes;

2. where parts of program carried on satellite signals are used as "quotations" and in a manner compatible with "fair practice": and,

3. where a developing country engages in unauthorized distribution of program-carrying signals "provided that the distribution is solely for the purpose of teaching, including teaching in the framework of adult education, or scientific research." [96]

There is no escaping the fact that these limitations and exemptions are departures from the apprcach the Convention takes to protection of satellite distribution systems. While the Convention is concerned with "the container"

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any domestic law; the laws to which the originating organization is subject will be applicable. R. Dittrich, "The Brussels Satellite Convention," op. cit, at 63.

92/ Art. 2(3), SATELLITE CONVENTION

93/ Article 8, SATELLITE CONVENTION

94/ Article 2(2), SATELLITE CONVENTION

95/ Article 4, SATELLITE CONVENTION.

96/ Id.

and not "the contents," the exemptions go directly to the copyrighted or otherwise valuable contents impressed upon the signal.

To some copyright owners, Article IV was seen as eroding proprietary rights in programming, particularly in developing countries. They regarded themselves as receiving in exchange less than concrete assurances that any protection obtained would be really "adequate." Given that when the Convention was signed in 1974, commercially significant signal poaching was more possible than actual and that satellite systems were not then widely used to distribute copyrighted works of commercial significance, the concerns over these possibly excessive exemptions prevailed over the desires to establish international law respecting satellite signal theft.

The position of the United States proprietary interests was mirrored by concerns of the United States educational community: the latter felt that the needs of systematic education for unimpeded access to programming for use in the classroom were greater than as provided for in Article IV.

Complicating both positions was the on-going general revision of the United States copyright law raising a host of educational and library use questions. Uncertainties over proprietary and user rights under the proposed law made interested groups wary of appearing to endorse too fixed a position in any forum, for fear that it would be held against them in the course of Congressional decision-making on domestic copyright legislation.

The failure to ratify the Brussels Satellite Convention promptly constituted a lost opportunity. 97/ While the Convention's obligations are indeed very general and do not carry any inherent promise that satellite signal poaching can be brought under control, United States ratification would have

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97/ As this is written, the U.S. Senate is preparing to consider ratification of the Brussels Satellite Convention.

provided an early occasion to inject a fundamentally important norm into the political-legal turmoil surrounding copyright and international communications development: satellite signals contain commercially valuable materials, the misappropriation of which is to be stopped. From this basis, nations could gradually sort out the intellectual property aspects of satellite signal distribution systems, perhaps evolving into a system of private rights for actual creators just as early "copyright-type" laws protected publishers before maturing into a system of authors' rights.

The increasing cost effectiveness of space satellites as mechanisms for distribution of broadcast programming and cable television services has prompted a boom in the number of domestic signals containing copyrighted, mass entertainment programming. As will be discussed in detail later in this Report, the receivability of satellite signals in areas contiguous to markets intended to be served by originators has made satellite signal poaching a problem in the Western Hemisphere. [98/] For this reason alone, copyright proprietors and broadcasters have reversed their earlier position and now embrace the Satellite Convention. And with passage of the 1976 Copyright Act and the negotiation of off-air taping guidelines with proprietors, the concerns of educational interests have been calmed. So long as adherence to the Convention does not upset the balance of rights and privileges classroom activities presently enjoy under the copyright law, educators who have spoken to the question have subsided in their earlier opposition to United States ratification.

[98/] See, Infra, at 107.

Conclusion on Part One

The multilateral and bilateral copyright treaties herein discussed represent almost a century of effort and real achievement. The perception of the Swiss government in the late nineteenth century that international copyright protection should be grounded on three objectives remains valid today: 1) that the interests of all the world's authors should be secured by common, international legislation creating private rights flowing, at least in part, directly to individuals; 2) that the bedrock of these rights must be "national treatment," because it links the condition of any nation's authors to that of all other authors; and 3) that the uninterrupted collaboration of governments in the study and political reconciliation of differing copyright perspectives, provides the surest, most enduring, basis upon which the future of copyright can be built.

There is no getting around the fact, however, that this vision has lost some of its luster today. The politicization of the United Nations system, of which WIPO and UNESCO are parts, has tended to sharpen the differences, at least between developed and developing countries; the intractability of copyright piracy in many places has raised further questions of the practical effectiveness of copyright treaties; and the vexing and contentious issues of new rights and subject matter in new technologies are proving so difficult to resolve in a spirit of goodwill that some find it hard to keep faith with the notion of gradual progress in copyright matters through international mechanisms. These are issues which will be revisited in the remaining parts of this Report. The Copyright Office believes it is imperative that the copyright challenges facing United States authors and rightsholders abroad be understood in the full context of copyright development. Part Two ofthis Report examines those challenges.

PART TWO: THE NATURE OF THE PROBLEMS

Before examining the extent and nature of copyright problems in today's world, it is important to recall that less than 100 years have elapsed since the United States began shedding its own well-deserved reputation as a major copyright-pirating nation. Virtually every present argument in support of the "social utility" of copyright piracy and of economic self-interest justifications for the non-recognition of foreign copyrights --"infant industry" protectionism, balance of payments deficits, possible abuse of monopoly power by foreign rightsholders, to name but a few -- were uttered on these shores long before they were heard from the copyright policy makers of new African and Asian countries. 99/

Since the United States, for so long, had taken the view that international copyright was dangerous to domestic interests, it should be no surprise to hear our own words in the mouths of others. When the United States finally entered the international copyright community, we hedged our laws with impediments to acquiring and enjoying copyright in the name of preventing abuses of monopoly. Thus, it would be disingenuous to affect surprise when others show the same sorts of concerns. This is a theme which shall be returned to, in greater detail, in the final part of this Report.

99/ Dr. Warren Bezanson's doctoral dissertation on the evolution of United States international copyright policy during the period 1866-1891 reflects all of these anti-copyright sentiments in detail. If there was one "bete noire" to United States circles favoring international copyright recognition, it appears to have been the extraordinary Henry C. Cary, of Philadelphia. Dr. Bezanson's description of Cary's long-successful efforts to thwart the development of trans-Atlantic copyright relations makes clear the practical nexus of trade and tariff policies with copyright. BEZANSON, THE AMERICAN STRUGGLE FOR INTERNATIONAL COPYRIGHT 161-182. [doctoral dissertation: U. of Md., 1953].

Intellectual property law initially focused upon the economic interests of printers and publishers. However, by the close of the seventeenth Century, the gradual expansion of freedom of the press, coupled with doctrinal evolutions stressing the basis of rights in works as the author's personality, lead to a shifting of the object of copyright protection to the actual author. 100/

The development of copyright, specifically international copyright, is due to piracy. Piracy of French works in the Low Countries, of German language works among the states of the German Confederation, of Italian works in Switzerland and elsewhere, prompted the conclusion of bilateral copyright agreements among European states beginning first in 1827. The works pirated were principally books; the nature of the piracy appears to be at least as much reprinting as unauthorized translation.

The conditions which sustained copyright piracy in the 18th and 19th Centuries are similar to those which exist today: 1) the attitude of certain countries not to acknowledge a property interest of an author, publisher, or both, to control the circulation of intellectual works; 2) the allure of profits to be made, with a minimum of investment and risk; and 3) the demand for creative works which outstripped the ability of rightsholders to meet that demand at prices which relate to real costs of production and distribution.

100/ In Anglo-American history, the shift of focus of the law of literary property, away from industrial users of creative works to the actual creators, is generally traced to the Statute of Anne, 8 Anne, c. 19 (1710). See, for example, Professor L. Patterson's "The Statute of Anne: Copyright Misconstrued," 3 Harvard J. on Legislation 223 (Feb., 1966); and Patterson, "Private Copyright and Public Communication: Free Speech Endangered," 28 Vanderbilt L.R. 1161, 1169-1182 (Nov., 1975).

The problems United States copyright owners face abroad with respect to these conditions can be classified into three categories: 1) ineligibility for copyright protection in a foreign country; 2) inadequate copyright protection in a foreign country; and, 3) ineffective copyright protection in a foreign country.

Ineligibility for Copyright Protection in a Foreign Country

With the exception of France, and there only for a comparatively brief time period [101/], no country automatically protects the works of foreign authors and copyright holders as a matter of course. In all countries, two tendencies are discernable: 1) to protect unpublished works on an open-ended

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101/ Ladas explains the origin of the French Decree of 28 March 1852, declaring piracy of foreign works a crime:

> .... The thought was being crystallized in France that bargaining was not the best method of securing international protection of authors' rights, and that if France should begin declaring that piracy of a foreign work was a crime punishable by the law, the other governments would be more willing to take the same step. 1 LADAS 27.

Court decisions appeared to limit the open policy of the 1852 decree; history clouded the motives and interpretation of the decree. It never appealed to United States copyright interests in any event. 2 Copyright Law Revision Discussions And Comments On Report Of The Register Of Copyright On The General Revision Of The United States Copyright Law 189 (Feb., 1963).

basis without regard to the nationality of either the author or copyright owner [102]; and 2) to protect published works of non-nationals only upon compliance with certain eligibility requirements. [103]

There is no such thing as an "international copyright," acknowledged with equal force in all states (or all states participating in international arrangements). The availability of any copyright protection at all depends upon the eligibility requirements of particular states. A salient feature of multilateral copyright agreements is the standardization, among the contracting parties, of eligibility requirements.

Although the concept of national treatment is generally the basis for protection of foreign works, reciprocity can play a role in determining eligibility for such protection. While a state theoretically can impose any sort of eligibility requirement, in practice, there are four commonly encountered conditions: 1) first publication of a work in a given state. (Eligibility on this basis is essentially less an act of generosity than of commercial good sense: works, first exploited in a state, by definition, are integral parts of that state's cultural marketplace and should be subject to the principal laws governing that marketplace); 2) domicile of the author in the state where protection may be sought. (It is a near-uniform tendency of modern copyright laws to assimilate domiciliaries to nationals for purposes of determining eligibility of a work for copyright protection); 3) nationality of

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102/ United States law is typical in this respect. 17 USC §104(a) extends the 1976 Copyright Act to all unpublished works "without regard to the nationality of the author."

103/ 17 USC §104(b) extends protection to foreign works in five cases: a) The author is a national of a state with whom the United States has copyright treaty relations; 2) The author is stateless; 3) The work is first published in the United States; 4) The work is first published in a UCC state; 5) The work is authored by a national of country with whom the President has proclaimed copyright eligibility.

an author in a country with whom the forum state has established copyright relations by treaty or other agreement; and 4) the first publication of a work a state with whom the forum state has established copyright relations.

United States copyright owners may be ineligible for copyright protection in a foreign state because of non-membership of that state in either the Universal or Berne Conventions, or the absence of a bilateral copyright arrangement with the United States. Thus, the United States does not appear to have copyright relations with the following states: Afghanistan, Albania, Bahrain, Bhutan, Egypt, Ethiopia, Iran, Iraq, Jamaica, Mongolia, Nepal, Oman, Qatar, San Marino, Saudi Arabia, Sierra Leone, Tonga, the United Arab Emirates and Yemen (San'a). Not surprisingly, copyright piracy has in recent times thrived in some of these states.

A second category is that of foreign states where eligibility of United States authors based on "unclear" or legally uncertain copyright relations. This category consists of newly independent nations in which eligibility existed prior to independence either by extension of the domestic law, of a colonial power to the former colony. 104/ For a surprisingly large number of states, it is still not settled whether those colonial obligations have been maintained subsequent to independence. However, until otherwise informed by the foreign states concerned, the posture of the United States with respect to

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104/ United States Copyright Office, Circular 38a, International Copyright Relations of the United States, explains "unclear" status as:

> Became independent since 1943. Has not established copyright relations with the United States but may be honoring obligations incurred under former political status.

these new nations is as if there were no copyright relations: nationals of these states, under Copyright Office practices, are not eligible for registration of claims to United States copyright in their works. 105/

The states with unclear copyright relations are: Angola, Antigua and Barbuda, Belau, Benin, Botswana, Burma, Burundi, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cyprus, Djibouti, Dominica, Equatorial Guinea, Gabon, The Gambia, Grenada, Guinea-Bissau, Guyana, Indonesia, Ivory Coast, Jordan, Kiribati, Korea, Kuwait, Lesotho, Libya, The Malagasy Republic, Malaysia, Maldives, Mali, Mauritania, Mozambique, Nauru, Niger, Papua New Guinea, Rwanda, St. Lucia, St. Vincent and the Grenadines, Sao Tome and Principe, The Seychelles, Singapore, Solomon Islands, Somalia, Sri Lanka, Sudan, Surinam, Swaziland, Tanzania, Togo, Trinadad and Tobago, Tuvalu, Upper Volta, Vanuatu, Vietnam, Western Samoa, Yemen (Abu) and Zimbabwe. 106/

Of these states, seventeen are adherents to a text of the Berne Convention, thereby providing United States copyright holders with an indirect means of making their works eligible for copyright protection through first publication in a country party to Berne. In the remaining states, however, the availability of copyright protection is uncomfortably doubtful.

One should not infer from the absence of copyright relations that other forms of legal protection against the unauthorized reproduction and distribution of copyrighted works are utterly unavailable. The point and the problem

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105/ Other bases for eligibility under section 104 of the copyright law, however, may confer eligibility; for example, first publication in the United States, or in any UCC state.

106/ Copyright Office Circular 38(a) [1983].

is uncertainty, with the potential for capricious or arbitrary denial of rights in copyrighted works, with unpredictable marketplace consequences for investment, licensing, and distribution by copyright industries.

Obviously, not all of the countries on these two lists represent markets of considerable present importance to United States authors and copyright proprietors. A number of these countries are, however, important -- as users of United States works or as centers for significant pirstical activities.

Piracy in the Middle East:

Leaping out of these diverse countries listed are regional patterns. First, there is the Middle East, particularly the Persian Gulf. Jordan, Kuwait, Saudi Arabia, Yemen, Bahrain, Egypt, Iran, Iraq, Syria, Qatar, Oman and the United Arab Emirates are states where the United States has rather shaky copyright relations at best, if at all. Only in Berne Convention countries, is there any means of conferring eligibility, for copyright protection of American works. [107/]

With important states completely outside the international copyright community, commercially significant copyright piracy appears to be epidemic in the Persian Gulf. In the sound recording field, The International Federation of the Phonographic Industry (IFPI) has identified the Persian Gulf as terra incognita for copyright protection, asserting that, for example, in Saudi Arabia

> ... it is virtually impossible to find a recording that has been produced with the consent of the original producer. The estimated 25,000,000 annual sales of pirate recordings in

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[107/] Egypt is a member of the Berne Convention.

Saudi Arabia is considered to be understating the actual extent of the problem. [108]

According to IFPI studies, the percentage of the cassette market in Middle Eastern states represented by piratical copies of sound recordings, is startling: Egypt at 41-60%, with Bahrain, Kuwait, Lebanon, Saudi Arabia, Syria, the United Arab Emirates each at 91-100% of the market. In 1982, the value of pirated tapes exploited in the Middle East was estimated by recording industry sources at approximately $US 66 million. [109]

The largest piratical market for sound recordings in this region, according to all industry figures, is clearly Saudi Arabia. [110] Unconfirmed reports indicate that the Saudi Government is said to be considering the adoption of a domestic copyright statute. Even if Saudi Arabia were to take this step, however, there would remain the question of obtaining eligibility for protection for United States copyright holders and their works.

The position of Egypt warrants special attention. Like Saudi Arabia, Egypt is a major Arab state. While Egypt and the United States do not have basic copyright relations, Egypt, as a Berne Convention country, will protect the works of non-Berne authors, including those of the United States, by virtue of their first publication in a Berne state. In addition, Egypt and the United States both are members of the Geneva Phonograms Convention.

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[108] M. Edwards, "Audio Piracy," MEDIA LAW 112.

[109] IFPI, "Extent of Piracy," op. cit. at note 125; Statement of Jon Hall (IFPI), in WIPO, Worldwide Forum on the Piracy of Sound and Audiovisual Recordings, Geneva, March 25-27, 1981, PF/I/1, at 4.

[110] M. Edwards, "Audio Piracy," MEDIA LAW 113; Statement of R.I.A.A., before The International Trade Commission, op. cit., at 8.

Although record industry estimates indicate that approximately 40-50% of the Egyptian cassette market is piratical, it appears that the government, with support from local creative industries, is making earnest efforts to combat piracy. These efforts include: the formation of special police units dedicated to audio piracy enforcement; the close administration of record and tape manufacturing facilities; the active involvement of the national Authors Organization in antipiracy efforts; and the imposition of import restrictions and controls of exports. 111/

The impetus for these efforts is the fact that Egypt is a center for sound recording production and distribution for the Arabic-speaking world. As a result, Egypt is concerned about piracy of their own works in the region. 112/

The position of Egypt is not really unique: record and tape markets often bestride national boundaries; music is both unique to particular cultures and

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111/ See, statement of Mohamed Gouma, WIPO FORUM, PF/I/S/7, at 1-2.

112/ This is evidenced by the observations of Mohamed Gouma, Vice-President of Sono-Cairo Record Company:

> . . . [O]ur songs are pirated in many other countries, and especially in the Arab Gulf Area. In order to protect ourselves, up to a certain extent, against these illegal procedures, in the absence of any assistance or intervention of the official institutions in those countries, we are obliged, before releasing a song in our own market, to get paid by our local distributors in such countries a certain amount of money per song, and this investment obliges them to fight in their own interest against the pirates in their respective countries. However, it is obvious that the amount of funds we can ask for from our distributors is considerably lower than the income which our performers would have, if the respective governmental institutions in these countries would accept to take measures against the pirates. Statement of Mohamed Gouma PF/I/15/8, WIPO WORLDWIDE FORUM ON THE PIRACY OF SOUND AND AUDIOVISUAL RECORDINGS, GENEVA, MARCH 25-27, 1984, AT 2 [hereinafter WIPO FORUM].

transnational. In that light, the economic protection and promotion of national sound recording capacity in developing states serves to build national identity and support a potential export industry.

As in the case of sound recordings, virtually the entire domestic market for video cassettes of motion pictures in Saudi Arabia, Kuwait, and Bahrain is occupied by pirates. 113/ In the remaining Middle Eastern states, the pirates simply predominate.

Because of their ineligibility for copyright protection, United States film companies also lose potential revenues from unauthorized, commercial, public performances of their films, usually in hotels and similar establishments, and as programming for broadcasts and other transmissions.

The film piracy problem in the Middle East is a paradigm of piracy based on a complete absence of copyright eligibility for foreign works. Copyright systems are non-existent; the hardware for performing and reproducing films is widely available to a significant number of nationals; and, there are high numbers of transients from industrialized countries, who constitute a solid market for video (and audio) product. Further, the absence of a theatrical infrastructure for exhibition and non-existent national film production capacity precludes the development of an indigenous group of creators or entrepreneurs with copyright interests.

113/ "Piracy represents a major problem in most of this region, due to the non-existence or ineffective protection of copyright and other intellectual property laws .... In many countries, the pirate market prevails over legitimate distribution, with unauthorized public performances in hotels constituting a significant form of piracy." Greenspan, "Film and Video Piracy," MEDIA LAW 120.

The result of this paradigm is almost impossible to describe in credible terms: an international bazaar of "stolen" intellectual properties. Through tourism, resident and transient workers, embassies, consulates, and exports of large shipments of videocassette recordings, Saudi Arabian film piracy pollutes the entire Middle East and reaches into Western European markets.

Unfortunately, the situation in Kuwait parallels that of Saudi Arabia. A small, wealthy state, Kuwait is the site of one of the world's most modern film processing and videocassette manufacturing plants. Kuwait has no indigenous film industry, nor is it an authorized distributor for films for home video.

The absence of so many Middle Eastern states from international copyright arrangements is of great concern to film and record producers and distributors in all Western countries, not just our own. And, as the Egyptian situation demonstrates, the problems United States, United Kingdom and other copyright-exporting states face in the region are acutely felt by some states in the region itself.

Africa:

The second region which emerges from the list of states with whom United States copyright relations are non-existent or unclear is Africa. The United States does not have direct copyright relations with over thirty of the new African nations. [114]/ Approximately one-half of the African states are, however, members of the Berne Convention, providing an indirect means of protecting United States works.

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[114]/ Copyright Office Circular 38a makes clear that the overwhelming majority of these states are technically "unclear" in their copyright relations with the United States.

Very little information is available about the overall level of copyright piracy in Africa. For example, the Worldwide Anti-Piracy Newsletter, distributed by the Motion Picture Association of America (MPAA) and the Motion Picture Export Association (MPEA), notes only one country as the locus of on-going anti-piracy efforts: The Union of South Africa. [115/] These efforts may be helped by the fact that the United States has a bilateral copyright agreement with South Africa.

MPAA has noted that:

> . . . Africa contains a high level of piracy due to political and legal problems in effecting legitimate distribution. The major forms of piracy include commercialization of off-air telecasts, bootlegging of film prints, and parallel imports (chiefly from the United Kingdom). [116/]

Only seven African states [117/] are assessed by IFPI in terms of copyright piracy activity and two of those [118/] are probably more responsive to the Middle Eastern situation than to continental African marketplaces.

Apart from these general observations, only one country clearly has been identified as a major center for the reproduction, distribution and transshipment of piratical copies of United States protected works: Nigeria. [119/]

115/ MPAA, Worldwide Anti-Piracy Newsletter, April 27, 1984, at 5 [hereinafter APN]; for that month, South African authorities conducted 35 raids and 54 voluntary inspections of premises believed to be used for the manufacture or distribution of pirated video. MPAA, APN, June, 1984, at 7.

116/ Greenspan, "Film and Video Piracy," MEDIA LAW 123.

117/ Nigeria, Ghana, Morocco, Tunisia, Egypt, South Africa and Kenya.

118/ Egypt and Kenya.

119/ IFPI, "Extent of Piracy of Sound Recordings Worldwide in 1982," notes Ghana, Morocco, Nigeria, and Tunisia as countries with over 80% pirate cassette markets, but Nigerian piracy has a dollar value over 100 times higher than its nearest "rival," Egypt. Letter from M. T. Edwards (IFPI anti-piracy coordinator) to Stanley Gortikov (President, RIAA), July 22, 1983.

The copyright problems in Nigeria are of concern to all film, sound recording, book publishing and broadcast programming proprietors. The significance of Nigerian piracy is, however, quite different from that encountered in the Middle East, where the problem exists at the very threshhold of intellectual property: non-recognition of foreign copyrights. Nigeria is a member of the UCC. It was one of the first UCC states. For this reason, Nigeria will be discussed later in this report in connection with its piratical traffic with Taiwan as a major example of ineffective, rather than non-existent copyright protection. 120/

Asia and the Pacific Basin -- General Observations:

The final region which emerges out of consideration of those countries with whom the United States does not have direct copyright relations with is Asia, principally the countries of the Pacific Basin. The United States has "unclear" copyright relations with Burma, Indonesia, Malaysia, Korea, Sri Lanka and Singapore. Although Taiwan has been a traditional locus for copyright piracy, the existence of copyright treaty relations with the United States provides our copyright holders with a basis for enforcement. 121/

120/ Infra, at 116.

121/ United States-Taiwan copyright relations are based upon provisions of two Friendship, Commerce, and Navigation (FCN) Treaties, November 4, 1946 and October 8, 1903, respectively at 63 Stat. 1299 and 33 Stat. 2213. The copyright provisions of both treaties are set out in CLTW, United States: Item 11. These are, in copyright terms, unusual and are now obsolete. Their obsolesence is evidenced by the fact that neither Taiwan nor the United States strictly adheres to them within their respective laws. The problem with the treaties lies principally in their exemption of translation rights from the obligation to protect copyright. The 1903 bilateral provides:

> Whereas the Government of the United States undertakes to give the benefits of its right laws to the citizens of any foreign State which gives to the citizens of the United States the benefits of copyright on an equal basis with its own citizens: --

As with Nigeria, the question in Taiwan is the adequacy of protection and its practical effectiveness, and Taiwan will be discussed later in this context. 122/

Of particular interest is the number of recognized centers of copyright piracy generally considered "newly industrializing countries" (NIC's); first and foremost are Hong Kong, Singapore, South Korea, and Taiwan. Somewhat below their level of development are Indonesia, Malaysia, and the Philippines. Of these two groups, the United States had direct copyright relations with only Taiwan and the Philippines. 123/ Indirect means exist to protect United

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> Therefore the Government of China, in order to secure such benefits in the United States for its subjects, now agrees to give full protection, in the same way and manner and subject to the same conditions upon which it agrees to protect trade-marks, to all citizens of the United States who are authors, designers or proprietors of any book, map, print or engraving especially prepared for the use and education of the Chinese people, or translation into Chinese of any book, in the exclusive right to print and sell such book, map print, engraving or translation of the books, maps, etc., specified above, which may not be reprinted in the same form, no work shall be entitled to copyright privileges under this article. It is understood that Chinese subjects shall be at liberty to make, print and sell original translations into Chinese of any works written or of maps compiled by a citizen of the United States. This article shall not be held to protect against due process of law any citizen of the United States or Chinese subject who may be author, proprietor or seller of any publication calculated to injure the well-being of China.

122/ Infra, at 120.

123/ Copyright relations with the Philippines are based upon a Presidential proclamation under §9(b) of the 1909 Copyright Act, October 21, 1948, 62 Stat. 1568.

States works in Singapore. Hong Kong is a special case: as a possession of the United Kingdom, it has had that country's international copyright obligations extended to it. [124/]

For United States book, sound recording, and motion picture copyright holders, it is clear that the impact of copyright piracy in the Pacific Basin is awesome. The effects of this piracy are felt throughout Asia and the disregard of copyright appears so total that major export industries in pirated works have been established. There is a general feeling in the private sector that Singapore is the piracy capital of the world. Their piratical products can be found as far away as Africa, Western Europe and Latin America. In the absence of a well-understood and accepted notion of the economic rights of authors, it may be natural that the Pacific NIC's have emerged as global copyright piracy centers. These states are long on printers and short on publishers, long on audio hardware and short on record producers, long on VCR's and short on film makers.

Although concrete figures are difficult to obtain, the Recording Industry Association of America (RIAA) has estimated that the number of piratical copies of sound recordings produced and distributed from the Pacific region annually approach 140,000,000 units. [125/] For 1982, IFPI weighs in with a more conservative estimate of approximately 100 million units. [126/]

[124/] In this connection, it may be worth recalling that UK sovereignty over Hong Kong is due to be transferred to the PRC in 1999, raising some interesting questions as to the basis for intellectual property protection thereafter.

[125/] Statement of the RIAA, before The International Trade Commission, op. cit., at 5-7.

[126/] IFPI, "Extent of Piracy," op. cit., note 115.

Video piracy in the Pacific Basin also is widespread and has been acknowledged as a major commercial problem by responsible officials of India, Indonesia, Malaysia, the Philippines, and Singapore. [127/] However, while the MPAA World-Wide Anti-Piracy Newsletter frequently reports specific cases of film piracy from Hong Kong, Indonesia, Malaysia, and Singapore, it is difficult to estimate either quantities of pirated copies or their dollar value.

The two major Pacific Basin centers for copyright piracy where United States copyright owners are not eligible for protection are Hong Kong, Singapore, and South Korea. Hong Kong, the third traditional locus of Pacific piracy is a special case: since 1973, the UCC has been extended by the U.K. to that territory; and since 1974, the Geneva Phonograms Convention has applied to Hong Kong.

Reduction of Piracy in Hong Kong:

During the 1970's, Hong Kong was considered a major pirate market for sound and video recordings. [128/] As already noted, United States copyright owners are eligible for copyright protection by virtue of the United Kingdom's extension to Hong Kong of texts of the UCC and the Phonograms Convention.

[127/] Statement of Mr. H. T. Djohardin (Secretary, National Film Council, Indonesia), WIPO FORUM, PF/I/S/6; Statement of Mr. Warren Khoo (Senior State Counsel, Attorney General's Chambers, Singapore), Id., PF/I/S/8; Statement of Mr. C.C. Stevenson (Royal Malaysia Police), Id., PF/I/S/16; Statement of Mr. Ajay Prasad (Deputy Secretary, Ministry of Information and Broadcasting, India), Id., PF/I/S/12; Statement of Col. V. G. Vinarao (Integrated National Police, Philippines) Id., PF/I/S/18.

[128/] In the late 1950's Hong Kong appeared prominently in Pacific area book piracy, "Literary Piracy in the Far East," 2708 Bookseller 1856 (November 16,. 1957). In the 1960's the record industry attacked Hong Kong record piracy (counterfeiting as well as pirate product). C. Myatt, "New Fines Would Tap Pirate Boonty," 75 Billboard 34 (November 23, 1963). By 1976, Hong Kong copyright piracy had moved to tape, with piracy accounting for "over 95% of the local market, and large numbers of pirate cassettes were being exported to other countries" T. Edwards, "Audio Piracy," MEDIA LAW 112.

These bases of eligibility for protection have permitted United States, United Kingdom and other copyright exporting countries to press for more vigorous application of existing laws to suppress Hong Kong's pirate entrepreneurs.

Increases in criminal penalties, a reinvigorated crack-down on duplicating labs and the introduction of enhanced export controls have, in the view of copyright owners, significantly reduced the level of Hong Kong's copyright piracy. 129/ Another key component of the successful enforcement of copyrights in Hong Kong is the existence there of an MPAA Film Security Office and a local headquarter of IFPI's Pacific operations. The actual presence of these rightsholders groups, with organized enforcement capabilities able to interact with local law enforcement officials, and to make cases against pirates and thereby share the economic burden of copyright surveillance, undoubtedly explains the success that has been achieved in Hong Kong.

Piracy In Singapore:

As noted earlier, the piracy of sound and video recordings in Singapore is a sizable local and export industry. Singapore officials state their view, not fully shared by rightsholders, that the basic causes of this piracy:

> . . . have to do with the fact that the genuine products are priced beyond the reach of the average consumer. The problem is compounded in developing countries where income

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129/ The experience of Hong Kong shows that audio and other forms of copyright piracy can be brought under control, even when it is the source of considerable profit to locals. But the other lesson of Hong Kong is this: despite the strong United Kingdom interest in stopping audio piracy and despite their considerable leverage, IFPI learned:

> ... that this success was not achieved overnight, but rather as a result of many years of hard and often frustrating effort: it took ten years from the time IFPI first established a base in Hong Kong for piracy to be reduced to its present levels. As in all other markets, constant vigilance is required to keep piracy at a low level. T. Edwards, "Audio Piracy," MEDIA LAW 112.

> levels are low and where nevertheless there is a growing and insatiable demand for knowledge and for other fruits of intellectual endeavour in the broadest sense of the word. [130]

While it may be true that the cost of legitimate copies of United States works are comparatively higher than pirated copies, the entire price differential, in addition to copyright royalty payments, may include substantial manufacturing and distribution costs, quality requirements, and payments to creative interests other than authors. In contrast, without any of the costs of publishing, manufacturing, and serving markets in a continuing relationship, the pirate's entire investment is put into the least expensive aspect of video and audio cassette production, with a larger profit margin than legitimate exploiters can ever hope to achieve. It is reported that, during the period June 1982 - April 1983, forty-six raids of pirate manufacturing establishments were conducted by Singapore police. [131] These raids yielded 396,837 cassettes -- a mere fraction of the total pirate production which would be difficult to fully control in any case.

Significance of Singapore's Export Activities. It has been estimated that Singapore's pirate record and tape industry exported approximately seventy million unauthorized sound recordings in 1982, or nearly five times the number sold in Singapore itself. [132] These export activities, which exploit international best sellers as well as local favorites, cause losses of millions of dollars to record producers, composers, and interpretive artists.

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[130] WIPO FORUM, PF/I/S/8, at 2.

[131] Statement of the RIAA, before the United States International Trade Commission, "The Impact of Foreign Product Counterfeiting on the United States Recording Industry," September 19, 1983, at 5.

[132] Id.

The problems Singaporean copyright policies pose are not limited to United States nationals or those of Western Europe. Singapore piracy also is putting at risk the development of international cultural commerce throughout the world.

In 1981, for example, the Registrar-General of Kenya noted that the increasing presence of piratical recordings in his country not only results in losses to Kenya of customs duties, sales, and income taxes, but also affects:

> . . . the marketing of works of our local composers and musicians, for if cassettes of internationally famous musical works can be sold locally at a fraction of their real price, such foreign works are likely to swamp the sale of local works. [133/]

Similar concerns were expressed by delegates from India and the Philippines during a WIPO worldwide forum on the piracy of sound and audio-visual recordings [134/], and have been generally supported by international intergovernmental organizations concerned with copyright. Recently, reports on the impact of record piracy upon the health of African recording interests make the observations of the Kenyan Registrar-General seem pale:

> Africa's reputation as major new source of music repertoire is facing a serious setback if effective action is not taken soon to counter the tremendous growth of piracy in those widely different territories.
>
> With the recession biting deeper in most African countries, music outlets have looked to maximize profits in the face of diminishing consumer demand. The problem is further aggravated by the fact that record manufacturing plants are being forced to raise unit pressing costs to cover overheads with lower unit output. And as legitimate producers rise in cost, consumers are turning to the less expensive alternative pirate products. [135/]

133/ WIPO FORUM, PF/I/S/5, at 2.

134/ WIPO FORUM, PF/I/S/12, at 1; PF/I/S/18, at 1-2.

135/ R. Andrews, "Piracy Hurting African Growth: Steep Pressing Costs Also Take Toll on Sales Volume," Billboard, at 9 (July 7, 1984).

In West Africa, record production is down "dramatically" from late 1970's levels. The indigenous recording industries of the Ivory Coast, Malawi, and Nigeria are reported to have suffered serious setbacks due to piracy. The source of pirated copies of local and foreign works is often cited by experts in these African nations as one site in particular: Singapore. [136]/

The United States should be aware of the profound impact this piracy is also having on authors' and artists' rights throughout the world, particularly those in the Third World. The sophistication, subtlety, and modernity of much African popular music makes the field of sound recordings an area where real commercial opportunities exist for building copyright exports. The development of local recording industries in Third World countries could be the long-term foundation upon which the security in the region of United States sound recording-export industries rests. By sapping the strength of local copyright interests in developing countries, Singapore's record pirates are robbing creators of their present livelihoods and undermining the future possibilities for genuine two-way copyright trade in music.

This piracy also stifles efforts to build acceptance of copyright in the face of a substantial imbalance in the copyright trade between the industrialized and developing worlds. Local respect for copyright is roughly proportional to the economic health of national authors and copyright owners. Where strong copyright protection serves local prosperity, protection of foreign authors is easier to acknowledge.

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[136]/ Id.

United States - Singapore Copyright Discussions. It is difficult to gauge the true attitude of the government of Singapore toward the copyright piracy practiced on a grand scale by their nationals. During a visit by United States government copyright officials and industry representatives to Singapore in May 1984, a series of preliminary discussions on the copyright situation were held. [137/] Unfortunately, very little concrete information was obtained as to the progress made in revising Singapore's copyright laws. Even a requested general commitment by the Singaporean government to condemn piracy as "unacceptable" commercial behavior was not forthcoming. [138/]

There are, nevertheless, reasons to believe that the historical and present unresponsiveness of Singapore to United States and United Kingdom complaints over film and record piracy were not, and have not, been ignored. First, Singapore is in the midst of preparing for the general revision of their copyright laws, and it is possible that their modernization may contribute to controlling piracy. Second, the expansion of copyright to include protection for computer software has generated significant internal constituencies within Singapore favorable to intellectual property. [139/] Third, it is

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137/ Consultations in Taipei and Singapore were conducted under the overall direction of the Office of the Pacific Basin, International Trade Administration, Department of Commerce. Participating in the mission were officials of the Office of the United States Trade Representative, the Department of State and The Copyright Office. In Taiwan, the discussions were organized by the American Institute in Taiwan (AIT) and the Coordinating Council for North American Affairs (CNAA). Immediately prior to the copyright discussion in Taipei, discussions of counterfeiting and the piracy of industrial property were held. For both negotiations, representatives of concerned United States industries were present and, contributed to the analysis of particular intellectualproperty problems. The Singapore discussions were solely concerned with copyright.

138/ D. Ladd, "Developing Copyright Relations with Taiwan and Singapore: A Report on the 1984 Consultations," remarks before the International Anti-Counterfeiting Coalition Conference, Toronto, May 17, 1984, at 11-12.

139/ Representatives of the Copyright Office attended the Singapore-United States copyright consultations. Following the consultations, an informal

not possible in the long term for any state to play so large and global a role in copyright piracy as does Singapore today and still maintain harmonious trade relations with the victims of their piracy.

South Korea:

The third Pacific Basin country where basic ineligibility for local copyright protection makes it difficult to control burgeoning piracy is South Korea. While South Korea has, for some time, been as important a center for book piracy as Taiwan, there has been no evidence that it is a major source of pirated videocassettes or sound recordings at a level comparable to Singapore. 140/ The piracy situation in South Korea appears similar to that in several Latin American countries: endemic, serious, but catering more to local markets, than export markets.

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meeting was held with officials of Singapore's National Computer Board (NCB) and a U.S. private sector expert, Vico Henriquez, President of the Computer & Business Equipment Manufacturers Association (CBEMA) principally to discuss the needs of the software industry for legal protection against unauthorized use and copying of programs. NCB is a sophisticated organization carefully monitoring international developments in the protection of software. By and large, they appeared to understand the role of copyright protection for software in helping to order markets in many industrialized countries. As is the case elsewhere, however, a general lack of familiarity with fundamental doctrines of copyright, long established and intended to moderate the monopoly's impact upon commercial and non-commercial users, is lacking. NCB appears to recognize the need for further information on copyright, as a whole, and was sympathetic to proposals to organize seminars on the subject in the near future.

140/ IFPI estimates that, in 1982-83, pirate cassettes represented 25% of the South Korean market for recorded music, compared to 90% for Singapore and 95% for India. The dollar value of losses to recording interests in South Korea for the same period is estimated at $1.3 million dollars, compared with $20.8 million in Singapore. (These figures do not include the value of exports, manufactured in Singapore). Letter from M. Edwards to Stanley Gortikov, President, Recording Industry Association of America, July 22, 1983.

In the area of book publishing, South Korea is an important secondary market which, if United States publishing estimates are accurate, is close to 100% pirate. [141/] As elsewhere, high-cost reference, professional, and educational texts are the principal targets of pirate reprinters and translators. United States publishing sources estimate losses to South Korea's book pirates to exceed $100 million dollars annually; United Kingdom publishers estimate their annual losses at between L8 and L10 million. [142/]

Although the United States government has raised the piracy problem and the need for clear United States eligibility for copyright protection under South Korean law, little progress has been achieved so far in correcting these concerns. Notwithstanding United States urgings, South Korea continues to remain outside the UCC, largely because of strong opposition from members of the Korea Publishers Association (KPA), who believe "that respecting copyright will be detrimental to the nation because foreign publishers will extract exorbitant royalties." [143/]

141/ During the week of July 9, 1984, Leo Albert, Chairman of Prentice-Hall International, Inc., and an international book industry specialist long involved with United States book trade with the Third World, visited South Korea with Alexander Burke, Executive Vice-President of McGraw-Hill Book Co. Organized with the help of the Korean Cultural Center and local South Korean publishers worried about the erosion of the legitimate book market in South Korea, the Albert-Burke visit is the most recent on-the-spot assessment we have of the copyright situation in South Korea and its practical impact upon the book trade. Messrs. Albert and Burke prepared a detailed report, submitted to the Association of American Publishers, and have graciously made the report available to the Copyright Office.

142/ "Copyright in Korea," The Bookseller 1347, March 31, 1984. "Although some estimates have put the value of pirated books at more than $100 million a year in Korea alone, no precise figures on losses to American publishers can be made because the practice is a criminal venture and there is no way to judge what the potential sales market would have been for legitimate books." "Publishers Aim New Weapon at Piracy," Publishers Weekly, April 27, 1984, at 21-22.

143/ L. Albert, "Korea Copyright: A Status Report," at 1, [undated].

There is, however, an opportunity for serious working-level discussions with the South Koreans, seeking to break this impasse. The government of South Korea recently has released a draft for a revised national copyright law. Although, as presently drafted, its enactment would not enable South Korea to adhere to either the UCC or Berne Conventions, there are a number of provisions which could reduce the piracy problem, if United States nationals were eligible for local copyright protection with a reasonable basis for enforcement. For example, while eligibility could, under either the present or proposed law, be secured by first publication in South Korea, such a requirement would be an unrealistic and unworkable procedure for the great bulk of American copyright industrial output. In contrast, eligibility based upon the United States nationality of the author, attaching automatically, would help achieve the desired results.

Because South Korean book piracy does not yet appear to have a significant export component, the problems of providing low-cost texts for their students can be dealt with as an important local issue in ways similar to those accepted by much less prosperous developing nations. Even if South Korea is reluctant to join the UCC, that reluctance should not prevent them from considering means established in the UCC and accepted as reasonable by over eighty nations to assure the availability of educational materials.

Conclusion on Ineligibility for Copyright Protection:

Singapore and South Korea are among the economic leaders of the Pacific Basin and are the sources of extensive copyright piracy. To somewhat lesser degrees, Indonesia, Malaysia, the Philippines, and Thailand, also face piracy

problems. 144/ In all the Asian and Pacific Basin states, revisions of the copyright laws have either been recently achieved or are in an advanced preparatory stage. While they all seem to be acting upon copyright at the same time, they are not acting together.

The "copyright characteristics" of Pacific Basin states are, in fact remarkably similar. Most states have unclear or non-existent copyright relations with the United States, a reluctance to enter into multilateral copyright treaty relations, net copyright importer status, and a large, profitable, group of pirate entrepreneurs. Thus, there may be benefits to approaching these countries on a regional, as well as country-by-country basis. 145/ While a multilateral approach might be viewed as reducing United States bilateral leverage in negotiating copyright improvements in individual states, it may have practical long-term advantages.

First, technology is portable and pirates are peripatetic. Stamping out piracy in Singapore may merely encourage a shift in illegal operations to other states, such as Malaysia. Taiwan's cooperation in working to curtail export of piratical books may simply encourage South Korea's reprinters to

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144/ Thus, the RIAA asserts that counterfeit and pirate tape sales in Indonesia represented losses to the recording industry of approximately $75.7 million. Statement of the RIAA before the International Trade Commission, op. cit., at 6. Similar activities in Malaysia have produced losses to legitimate sound recording interests of approximately $3.4 million. Letter of M. Edwards to Stanley Gortikov, op. cit, note 135.

145/ For this reason the Copyright Office supports the initiative of the Departments of Commerce, State and the USTR to organize copyright symposia in the ASEAN region. A broadly-based dialogue on intellectual property, organized around the need to build the global network of copyright agreements, is needed in the Pacific Basin.

fill the void in Third World markets. Thus, the proximity and interdependence of Pacific Basin states strongly supports regional, collaborative, action at least as a complement to bilateral initiatives. Second, developing a multilateral approach to Pacific Basin piracy as a regional issue could enable international copyright organizations to focus their educational and lobbying efforts appropriately. Finally, since developing countries may also be harmed by Pacific Basin piracy, their legitimate concerns also could be brought to bear in correcting this situation.

Adequate and Effective Copyright Protection

"Adequate and effective" copyright protection is a fine standard until it must be applied to the copyright circumstances of a particular country. One need only consider the views of United States copyright owners with respect to the adequacy of domestic copyright law as applied to home video and audio recording, or to library photocopying, to realize that copyright is frequently viewed by some interests as inadequate or ineffective in some respects. So when one speaks of foreign copyright laws as "inadequate and ineffective," what does it mean? When asking the United States government to influence foreign governments to protect our copyrights "adequately and effectively," what do our copyright industries contemplate?

These are very basic questions that lack solid answers. They have already been faced by the Executive during the CBI certification process. They would be faced again if several of the proposed bills linking trade benefits to protection of United States copyrights were to pass because the standard invoked in those bills is "adequate and effective" protection.

Earlier, this Report noted that the obligation to "adequately and effectively protect the rights of authors and other copyright proprietors" was fundamental to the Universal Copyright Convention. [146/] And the understanding of that term by the 1952 Geneva Conference was, at best, most general. Still, for a variety of reasons, the Copyright Office has chosen to examine the problems of the inadequacy and ineffectiveness of copyright protection abroad through an understanding of the Article I obligation imposed by the UCC.

First, notwithstanding the vagueness of this obligation, its meaning in practice is reflected in the essential features of over seventy-five national copyright laws. In many cases, if states where copyright piracy thrives were to apply only the minimum and most obvious elements of copyright protection to literary and artistic property, the position of all copyright exporting states would be greatly improved. Precisely because foreign states may be concerned over the local economic consequences of affording adequate and effective protection to United States copyrights, it may be important to hew closely and expressly to internationally accepted practice and experience in defining subject matter protection, minimum rights, and essential remedies. [147/]

[146/] Supra., at 34.

[147/] Barbara Ringer, former Register of Copyrights, restating the views of Professor Zachariah Chafee, has summed up the basic objectives of all copyright laws:

> (1) Subject matter coverage should be complete, so that new forms of creative expression are protected; (2) the scope of protection should be broad and unified so that new forms of infringement can be prevented; (3) protection should be international in scope; (4) protection should not go substantially beyond the purposes it is intended to serve; (5) protection should not be allowed to stifle independent creation by others and (6) the legal rules for securing and maintaining copyright should be convenient to handle. B. Ringer, "Copyright in the U.S.A," in STEWART, INTERNATIONAL COPYRIGHT 347 (Buttersworth:1983).

Second, over the next decade, the United States and most other UCC members will be attempting to reconcile what is domestically adequate and effective copyright protection in the Post-Industrial Age. These questions will involve the desirability of new sorts of rights under copyright, or the acknowledgement of new kinds of copyrightable subject matter. The resolution of these questions at the national level will shape treaty obligations in the international context. Therefore, any conception of "adequate and effective" protection suggested to states outside of the two main copyright Conventions should necessarily reflect the positions of the member states party to those instruments.

Third, the United States government has long taken the position that the preferred method of securing the rights of copyright owners and authors is through the adoption of laws compatible with the established practices of UCC states and then through adherence to the UCC itself. This may remain an objective even when approaching states in the context of bilateral relations.

Fourth, a focus on the basic private property rights governing well-known commercial situations can respond to the important problems facing for-profit organizations without compromising the position of non-commercial user groups. In international copyright matters, such as record, film, book, and satellite signal piracy, non-commercial users, including libraries and public educational organizations, do not have any major differences of opinion with rightsholders. But, in areas such as private copying, "fair use," and library

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The problem of evaluating the adequacy and effectiveness of copyright protection abroad can be illustrated through three examples: (1) Western Europe and its response to video piracy; (2) the Western Hemisphere and the Caribbean responses to satellite signal "poaching" and book piracy; and, (3) Nigeria and Taiwan, as examples of how fundamental civil and criminal laws can render copyright protection "ineffective."

Western Europe and its Response to Video Piracy: With generally affluent populations and, by United States standards fairly limited television fare, Western Europeans have embraced the VCR as a major component of their home entertainment.

As the Economist Intelligence Unit reports on the widespread sales of video hardware:

> Annual sales of VCRs in western Europe have rocketed from 340,000 in 1978 to 4.6 mn in 1982, at an average annual rate of increase of around 100 per cent....Growth rates in all countries, with the possible exception of Portugal, have been phenomenal, although there have been wide divergences in household penetration rates. 148/

The expansion of the video hardware market naturally has led to the development of a video "software" market. Here, the Economist notes that "the video software market has developed some problems of distribution, control and legal regulation quite different from anything on the hardware side." 149/ One of the most severe problems is video piracy.

Estimates of the pirates' share of Western European video markets are necessarily speculative and range from 50% of units in circulation in the Federal Republic of Germany, 60 - 70% in the Netherlands and, at one time, upwards of 75% in the United Kingdom. 150/ The MPAA has estimated its losses to piracy in the United Kingdom alone to be in the vicinity of U.S. $180

148/ C. Grant, "The Home Video Revolution in Western Europe," Special Report No. 144 (The Economist Intelligence Unit, April 1983) 13 [hereinafter cited as ECONOMIST. This excellent report should be read by everyone concerned with the development of home video. It puts in context legal, industrial, commercial and user practices, painting a picture of explosive, disorderly, growth which is only beginning to shakedown. Inadequate and ineffective copyright protection is a part and a result of this free market chaos.

149/ Id., 28.

150/ Id., 36-37. As to audio piracy, in 1976, it was estimated to be in the region of 2% of the United Kingdom market. The Director-General of the British Phonographic Industry Association then warned that audio piracy was on the verge of a dangerous increase. N. Robertshaw, "British Piracy Could Rise to 50% Unless Combatted," 88 Billboard 1 (May 15, 1976). In 1983, Gillian Davies, Associate Director-General and Chief Legal Advisor of IFPI, confirmed the trend perceived in 1976, but not the numbers. United Kingdom audio piracy is estimated at 15% of the market. G. Davies, "Introduction: The Threat of Piracy," MEDIA LAW 106.

million per year. [151/] Motion picture companies doing business in Italy report that "piracy is no less rampant in Italy than in many other territories .... representing 50 - 70% of total revenue -- around $9,000,000." [152/] In Greece, where only about 70,000 VCR's are privately owned, piratical videocassettes of major new releases circulate unchecked, since "videocassette piracy is not a criminal offense .... " [153/]

Given the speed with which Western European video markets are growing and the concomitant growth of video piracy, copyright holders felt prompt legal action to be urgent.

The United States has direct copyright relations through the UCC with all of the states of Western Europe. Through "national treatment," United States copyright owners are entitled to protection under national laws which, though varying in details, secure the copyright owners' right to control reproduction and initial distribution of copies of works to the public. Whether these laws adequately and effectively do so, however, is another matter.

In fact, the MPAA in 1975 recognized this potential problem and established a multi-million dollar world-wide anti-piracy program which operates a centrally served network of regional Film Security Offices (FSO's). FSO's perform a number of functions, including investigatory work, educational

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151/ E. Greenspan, MEDIA LAW 117, The Economist report on home video pegs losses to the legitimate trade from video piracy to be "at least L20 million in 1982." ECONOMIST 38.

152/ "Italo Market Gathers Steam; Pirates Hit, VCR Sale Up,' Variety, May 9, 1984, at 494. However, The Economist Intelligence Unit pegs piratical copies as occupying "between 25 and 35 per cent of the videogram business, perhaps not as high as might have been imagined. One reason is that the Italian video market is still in its infancy while another is that dubbing into Italian and duplication of tapes is in the hands of far fewer (and therefore more checkable) companies than, say, London." ECONOMIST 76.

153/ "Sans Copyright Law, Greece is Hounded by Pirate Operations," Variety, May 9, 1984, at 494; ECONOMIST 71.

efforts directed to dealers, consumers, police and prosecutorial officials, and lobbying for anti-piracy legislation all related to suppression of local film piracy. FSO's are located in New York, Los Angeles, London (head office for European anti-piracy program), Paris, Montreal, Hong Kong, Manila, Sydney and South Africa. In other countries, MPAA conducts FSO-type activities in cooperation with local distributors or acts through MPAA offices, using local counsel. 154/

As the 1983 and 1984 issues of the Anti-Piracy Newsletter report, these efforts have achieved several positive results:

> . almost 20,000 pirate videocassettes seized in the Federal Republic of Germany in the second quarter of 1983, with 161 prosecutions sought; 40 raids in eight cities in early 1984;
>
> . police raids in Spain, against retailers of pirated videocassettes and major duplicating facilities; the appointment by the Spanish Supreme Court of a single court to take jurisdiction over all film and video piracy cases;
>
> . 1,000 pirated videocassettes burned in London; another 1,000 in Glasgow; numerous individual criminal complaints, prosecutions and convictions;
>
> . raids on 17 pirate video dealers in The Netherlands during October and November, 1983, yielding 6,000 tapes;
>
> . In France, eleven arrested, 3,500 pirate videocassettes seized along with 300 illegal masters at two duplication factories. These outfits were alleged to have been supplying "25% of the illegal market in France, as well as markets in Belgium, Switzerland and South Africa." 155/ Twelve prosecutions in the first quarter of 1984, with over 100 in preparation.

At one time, the United Kingdom was what the Economist termed "as by far the worst offender":

154/ 166. A brief history of the development of film security offices is in, MPAA, FILM AND VIDEO PIRACY: MANUAL FOR INVESTIGATORS AND PROSECUTORS 1-2 (1984). FSO activities are coordinated through MPEAA offices in Caracas, Rio de Janeiro, Singapore, Rome and New Delhi.

155/ MPAA, Worldwide Anti-Piracy Newsletter, July 1, 1984, at 4.

> The United Kingdom has become the European centre for piracy because of several factors. There is a large home market, more price sensitive and perhaps less concerned with legality than many other markets; the most popular pirated material is English language feature films and the duplication facilities exist to produce the tapes. There is also fierce competition among large numbers of unregulated retailers.... But the main reason for the United Kingdom's position as pirate capital is simply that existing laws are weak and toothless; for copyright offenses under the 1956 Copyright Act the maximum fine per infringing copy is L25 subject to a maximum per transaction of L50, with criminal prosecutions attracting only a two month maximum jail sentence. With such meager penalties it is not surprising that the British police have been uninterested in enforcing the existing laws. 156/

The costs of United Kingdom piracy to "the legitimate trade" for 1982 has been estimated at around L120 million. The reaction of the copyright holders, and the government of the United Kingdom to this situation is instructive.

As a major film and television program production country, the United Kingdom has its own copyright owners, who fall victim to piracy along with their colleagues from the Federal Republic of Germany, France, Italy, and the United States. Because penetration of home video in Western Europe is growing rapidly, United Kingdom production companies were concerned about exports of piratical copies from the United Kingdom to the Continent. The key to both local and foreign trade interests, therefore, was was suppression of the huge United Kingdom pirate video industry.

As noted in the Economist, a central feature of the United Kingdom problem was the perceived ineffectiveness of the national copyright law. The rights of copyright owners in cinematographic works were, in general "adequate," and included the basic rights of "reproducing the work in any material form" and

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156/ ECONOMIST 37.

"publishing the work." Further,their law provides well-established civil remedies, including the availability of damages, injunctions, accountings, and the possibility of seizure of infringing copies of works. 157/

But laws that were "adequate" for the 1950's and 1960's may be proved "ineffective" in the 1980's. This was the case with the United Kingdom Copyright Act. Not only is civil litigation expensive, but also difficult to mount against clandestine manufacturing activities involving highly portable technologies. Recourse to criminal copyright infringement proceedings ran up against a number of obstacles. The main obstacle was that fines amounted to no more than a fee for doing business; and imprisonment terms were short and rarely imposed. Internal pressure from United Kingdom copyright owners, supported by foreign rightsholders, grew markedly.

As a result, the United Kingdom amended its copyright law in 1983 to provide stiffer penalties for criminal infringement of copyright, including up to two years possible imprisonment and fines of L2,000. Since enactment, a spate of dramatic seizures of infringing videocassettes, criminal prosecutions, and convictions have demonstrated the seriousness with which law enforcement authorities viewed copyright piracy and their will to take action against it. Today, United Kingdom officials encouragingly report "that pirate tapes now account for less than 35% of the market and that this share will diminish further." 158/

157/ Article 2(5)(a) and (b), United Kingdom Copyright Act, 1956, in CLTW, United Kingdom; item 2. The panoply of remedies under the U.K. Copyright Act is summarized in tabular form in, E. Greenspan, MEDIA LAW 119.

158/ ECONOMIST 101-102; Commission of the European Communities, "Proposal for a Council Recommendation on Action Against Audio-Visual Piracy," (84)290, June 6, 1984, at 1.

In order to bring legal order to their own home video market, and to lay a basis for similar steps in other Western European countries to which United Kingdom copyright owners hope to export works, the United Kingdom had to make copyright piracy a major crime and enforce the law. 159/

The United Kingdom's experience is important in a number of respects: 1) it is a precedent for action in other Western European states; 2) it confirms an apparent trend that video and audio piracy are principally public wrongs calling for solutions under criminal law as well as in tort; 3) it demonstrates a significant change in copyright marketplaces having the effect of rendering obsolete criminal copyright infringement laws to deter today's criminals, and (4) it shows that swift government action may be needed to repel copyright piracy.

That actions similar to those in the United Kingdom will be necessary in other Western European states is a near certainty, since the laws in some of these states only appear adequate in essential rights; in many states the remedies to enforce those rights are obsolete. For example, in Belgium, "piracy penalties are low and consist of fines rather than imprisonment" 160/ ; and Denmark's penalties have been termed "ineffectual." 161/

Other states, however, already have begun to modernize their laws to meet the piracy epidemic. For example, in Finland, amendments to the copyright law recently went into effect, increasing criminal copyright infringement penalties from six months to two years and expanding the search and seizure powers

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159/ 171. E. Greenspan, MEDIA LAW 119 has usefully summarized the new penalties under the United Kingdom Copyright Amendment of 1983.

160/ ECONOMIST 54

161/ Id., 57.

of police investigating such crimes [162]/ ; in late 1983, Spain enacted anti-piracy legislation providing fines of up to $650,000 [163]/ ; and action by Ireland to increase criminal copyright infringement fines from IRL 50 to IRL 800 is predicted by film industry sources. [164]/ These efforts have been supported by internationally active proprietary groups with assistance from legitimate distributors, exhibitors, and broadcast program-producers in the affected countries.

In addition to modernizing domestic laws, Western European states also are attempting to combat record and film piracy within the framework of the European Economic Community (EEC). Early in June, 1984, the Commission of the European Communities considered favorably a Proposal for Council Recommendation on Action Against Audio Visual Piracy. Noting with approval the efforts of Community member states in attacking local piracy, the supporting documentation to the Proposal stated:

> However, action against what is now a cross-frontier offense can only have any real prospect of working if it is likewise conducted on a cross-frontier basis....The time has come, therefore, for the Member States to make it clear that

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[162]/ Id., 59; MPAA, APN, July 29, 1984, at 4.

[163]/ As reported in MPAA APN, September 9, 1983, at 3.

[164]/ MPAA Newsletter, July 29, 1984, at 5.

> they are resolved to act together against piracy, and to equip themselves to do so, by harmonizing their efforts and stepping up their cooperation. 165/

Given the large economic interests of all Western European states, the existence of organized and effective trade associations, and the ability of law enforcement authorities to act vigorously, Western Europe appears to be responding to the dangers of copyright piracy.

The "war" on motion picture and sound recording piracy has created a large, and still growing, body of criminal copyright law where such actions were once a rarity. That the response to piracy in other industrialized countries is also resort to criminal laws evidences a shared sense of the necessity and propriety of this shift in enforcement means. Even in developing countries, a preference for criminal enforcement of copyright in the piracy area can be discerned.

It may be fair, therefore, to observe that "adequate and effective" protection of copyright, in at least certain kinds of works, must have a formidable criminal law component appropriate to the circumstances in a given market. The creation of a set of property rights in creative works such as films and sound recordings, and making them available to United States rightsholders on an essentially civil basis, may not be "effective" copyright protection. The suppression of willful commercial copyright piracy in

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165/ Commission of the European Communities, "Proposal for a Council Recommendation on Action Against Audio-Visual Piracy," op. cit., at 4. It may be useful to note the increasing tendency of the states of the European Communities to utilize their integrationist institutions to explore harmonization of copyright laws within the Community. Dr. Adolph Dietz's seminal study, A. DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY (Sijthoff and Noordhoff:1978), was first published by the Commission of the European Communities in 1976. Since then, we have seen the Community turn its attention to piracy, cable television and broadcasting, among other subjects. Many of these issues are explored in G. DAVIES and H. VON RAUSCHER AUF WEEG, CHALLENGES TO COPYRIGHT AND RELATED RIGHTS IN THE EUROPEAN COMMUNITY (Oxford:1983).

Singapore and Saudi Arabia, therefore, may require creation of serious criminal penalty deterrents, and licensing initiatives by rightsholders with effective pricing strategies appropriate to the given market.

The Western Hemisphere and the Caribbean and their Responses to Satellite Signal "Poaching" and Book Piracy: The Western Hemispheric experience with satellite signal poaching and book piracy further illuminates the problems which result from the application of antiquated and often inadequate copyright laws in confronting high-tech theft.

Satellite Signal Poaching. As described earlier in this Report concerning the negotiation of the Brussels Satellite Convention,use of satellite systems in the 1960's and early 1970's for distribution of mass-entertainment, copyrighted, programming was neither cost-effective nor quantitatively significant. 166/ Over the last several years, however, the use of domestic satellites has increased. Not only have the major commercial networks moved to satellite distribution for supplying their "feeds" to affiliates, but also special services such as HBO, CNN, ESPN, C-SPAN, and MTV are using satellites to deliver origination programming to subscribers of cable television, SMATV, MDS, and other program distribution systems. Finally, United States cable television systems operating under the Copyright Act's compulsory licensing provisions receive distant broadcast signals -- so-called "passive" and "active" superstations -- further distributed to the

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166/ Supra, at 61 et. seq. See also, D. Leibowitz, "Bringing Protection for Satellite Delivered Programming Down to Earth," 2 Communications Lawyer 8 (Spring, 1984); D. Ladd, L. Flacks, D. Leibowitz, "Footprints Over the Caribbean: Bringing Program Protection in Step with Satellite Technology," 1 Ent. Sp. L.J.1 (Spring, 1984).

systems via satellite. An unintended effect of these activities has been that foreign distributors within the "footprint" of the satellite signals, without the authority of copyright holders, have intercepted these signals and made commercially significant uses of them. The areas principally involved are in the Caribbean and Central America.

Before addressing the international implications of these activities, it must be acknowledged that similar legal issues raised by the unauthorized domestic interception by unlicensed commercial establishments, such as taverns and hotels, and by private individuals are presently being debated in the United States. Rationalizing United States policies governing the authorization of domestic satellite carriers to serve areas geographically contiguous to the United States, with serious copyright policy implications in those areas, has been a vexing problem which is being addressed by the government.

In many Caribbean and Latin American states, theatrical and broadcast markets for copyrighted programming are quite small. As a general rule, availability in this region of the most desirable United States television programming -- feature films -- arises long after domestic and Western European release. In fact, motion pictures become available to United States television viewers, through various types of pay television services, long before the same works are licensed for Caribbean and Latin American theaters or broadcasting organizations. [167/]

167/ The motion picture industry seeks to maximize returns on its investments in feature films by an ordered, sequential, distribution process, commonly called "tiering." From first theatrical release, which is most limited, to the disintegration of the last master negative in a film company vault, "tiering" attempts to offer films to different audiences, at different times,and at different prices, so as to maximize returns. In ways not sufficiently explored, "tiering" may benefit the public. Over-simplifying somewhat, the process offers consumers a choice: of paying more to see a film at a first-run theater when it is newest, or of waiting until it reaches neighborhood exhibitors, in exchange for lower ticket prices. Cable or pay-television households may choose to wait a bit longer; those who do not

Unauthorized uses of these satellite signals in the Western Hemisphere take a number of forms: private reception; limited public distribution by wire, sometimes in the name of "studying the English language" or to cater to tourists residing in hotels; the rebroadcasting of certain United States sporting events; and terrestrial, free broadcasting to the local populace. [168]/

For a variety of reasons, copyright owners' rights of authorization or remuneration relating to these uses is not well-settled. First, United States copyright relations with Antigua and Barbuda, Grenada, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago and Surinam are "unclear"; and, the United States has no copyright relations with Jamaica -- a major figure in the Hemispheric satellite signal-copyright controversy. [169]/ In each of these states, the threshold question of eligibility of United States rightsholders for local copyright protection is a high hurdle to overcome.

Second, although Caribbean territories dependent upon France or the United Kingdom generally apply the copyright laws of the colonial power, exemptions from relevant rights complicate protection of United States commercial

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wish directly to pay for a film's performance may wait longer for its broadcast on over-the-air television. It may be important to study whether and, if so, how, consumers benefit from "tiering", because the gravemen of the industry's complaints against certain new technologies is the way in which idealized tiering is distorted or made markedly less renumerative. To the extent that motion picture copyright owners are required to alter their "tiering" arrangements, because of video piracy, satellite signal piracy or the absence of control over a principal public use of their works, the impact upon consumers attracted by one or another "tier" can be negative. "Tiering" is briefly explained in E. Greenspan, "Film and Video Piracy," MEDIA LAW 116; MPAA, FILM AND VIDEO PIRACY: MANUAL FOR INVESTIGATORS AND PROSECUTORS, op. cit., at 3-4.

[168]/ These activities, of course, are not exclusively limited to the Caribbean. See, MPAA, FILM AND VIDEO PIRACY: A MANUAL FOR INVESTIGATORS AND PROSECUTORS at 4-5.

[169]/ Copyright Office, Circular 38a (1983).

copyright interests. The extension of Dutch domestic copyright law(but not the UCC) to the Netherlands Antilles has impeded resort to private rights in local courts, particularly in Aruba. 170/

Most interesting, however, is the position of Latin American and Caribbean states with whom the United States does have direct copyright relations.

One such state is Costa Rica, where United States satellite signals containing copyrighted programs have allegedly been intercepted and distributed without the authorization of rightsholders. United States and Costa Rican authors have been eligible for copyright protection in each other's country since 1899 171/; and since 1956, Costa Rica has been a member of the UCC. Yet, it is hard to assess the rights accorded under Costa Rican copyright law to new and increasingly important media. Its copyright law addresses traditional print-publishing questions, emphasizing translation and public distribution rights. While there are provisions in that law affecting copyright in "dramatic" works, nowhere is there mention of "motion pictures," "cinematographic works," "broadcasting," or the right to authorize the public performance of protected works outside of patently public places. The failure

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170/ Exploration of the legal basis for protection of United States copyrighted films in Aruba was the subject of a rather desultory correspondence between the MPAA, Copyright Office and Department of State. Letter from Sydney Schreiber (MPAA) to Lewis Flacks (Copyright Office), June 21, 1976; letter from Lewis Flacks to Sydney Schreiber, July 9, 1976. The effort to see if the Netherlands will coordinate with Aruba the extension of the UCC to the latter's territory still continues.

171/ Decreee No. 40 of the year 1896, The Law of Intellectual Property, in CLTW, Costa Rica: Item 1.

to identify these significant concepts is not surprising: with the exception of several non-irrelevant amendments made in 1948, the statute dates from 1896. [172]

A number of other Central American and Caribbean states present similar problems. The copyright law of Haiti dates from 1885; and although revised by decree in 1968, the basic remedies for violations of copyright are based on an 1835 statute. [173] Panama's copyright law was enacted in 1916 [174] and Jamaica's copyright law derives from the United Kingdom Coyright Acts of 1911 and 1913. [175]

The failure of these states to modernize their copyright laws is a function of their relatively small internal commerce in copyrighted materials and low level of copyright exports.

Book Piracy in the Dominican Republic. For almost a decade United States book publishers have been unsuccessful in efforts to stop nationals of the Dominican Republic from translating, publishing, and exporting copies of their books without permission.

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[172] The Amendments of 1948 "did not affect the copyright provisions of the basic Decree-Law." CLTW, Costa Rica: Item 1, "observation."

[173] Copyright Statute: Law on Literary and Artistic Property, official French text published in 42 Le Moniteur, October 10, 1885; English text reprinted in CLTW, Haiti: Item 1. The 1960 decree is a fairly modern revision recognizing public performance rights, including broadcasting. Decree relating to Copyright in Literary, Scientific and Artistic works, January 9, 1968, reprinted in CLTW, Haiti: Item 1A.

[174] Book IV, Part V., Administrative Code of Panama, Literary and Artistic Property, August 22, 1916, reprinted in CLTW, PANAMA: item 1.

[175] The Copyright Act, July 25, 1913, reprinted in CLTW, Jamaica: Item 1. Letter from the Honorable H. L. Shearer, Minister of Foreign Affairs to the Honorable George Shultz, Secretary of State, November 10, 1983, at 2.

Although the Dominican Republic has copyright relations with the United States under the Buenos Aires Convention of 1910, in recent discussions with rightsholders that government took the position that it was no longer bound by it. [176/] As a result, the standing of United States copyright holders to pursue local remedies was in serious doubt. Even if United States book publishers were protected under the national copyright law, it was not certain whether criminal remedies --including the seizure of infringing copies -- were available.

In essence, United States book publishers had few weapons at their disposal to suppress a major piracy problem affecting Spanish-language rights in their works. Diplomatic prodding and consultations with Dominican Republic authorities failed to produce a solution. Local registration requirements, non-UCC membership, uncertain remedies of an antiquated copyright law, and the absence of decisive action by private publishers (perhaps resigned to the problem and focusing upon keeping piratical copies out of other markets) ensured that the infringements would continue and, indeed, worsen. The Dominican Republic has, however, recently adhered to the UCC. [177/]

[176/] Since at least 1978, the McGraw-Hill book publishing company had been trying to enforce rights it believed it had against the piracy of university and high-school level books by nationals of the Dominican Republic. Pirated Spanish-language translations competed with authorized Spanish-language market editions, the copyright in which was owned by McGraw-Hill subsidiaries in Mexico. Local counsel advised McGraw-Hill that Dominican officials "informed us that they consider the Buenos Aires Convention as no longer binding on the Dominican Republic. It has been removed from the Compilation of Treaties of 1952... and the text of the Convention was placed in the Chancery's dead files." Memorandum from William C. Headrick and Mu-Yien Altagracia Sang (Kirkwood, Kaplan, Russin and Vecci) to McGraw-Hill, Inc., April 10, 1978, 8-9. Because the Dominican Republic was on the eve of a crucial national election, diplomatic overtures were withheld and do not appear subsequently to have gone beyond questioning the position of the Dominican Republic on its obligations under the Buenos Aires Convention.

[177/] See text at fn. 181, infra.

Caribbean Basin Initiative. The Caribbean Basin Economic Recovery Act, commonly referred to as the Caribbean Basin Initiative (CBI) [178/], is a cornerstone of the Administration's Latin American policy. It seeks to promote the strength and resilience of twenty-seven countries in the Caribbean by according economic assistance and tariff benefits to the eligible states for imports into the United States. Eligibility for CBI designation depends upon certain evaluations weighed against statutory criteria, some of which are mandatory eligibility requirements while others are variables which must be taken into account in making a CBI designation.

One purpose of these criteria is to tie important commercial and developmental benefits to socially and economically free societies. Many of the criteria are ultimately concerned with political freedom as much as with commercial relations. One of the mandatory criteria is that a CBI designee not engage in the rebroadcast of United States copyrighted material through a government-owned entity without the express consent of the copyright holder. [179/]

Among the criteria whose weight is essentially discretionary with the Executive are these:

> 1) The extent to which such countries prohibit its nationals from engaging in the broadcast of copyrighted material, including film or television material, belonging to United States owners without their express consent.

178/ The Carribbean Basin Economic Recovery Act, Pub. L. 98-67, 97 Stat. 369 (1983). [hereinafter, Pub. L. 98-67]

179/ PUB. L. 98-67, §212(a)(5)

> 2) The extent to which such country provides under its law adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights. 180/

Taken as a whole, these designation criteria use the offer of valuable trade concessions by the United States as an incentive to two very different sorts of steps by otherwise eligible CBI states: first, to stop and prevent the unauthorized interception and use of U.S. programming distributed by satellite; second, to encourage CBI states to make their internal laws governing intellectual property responsive to goods and services important to the economic well-being of the United States.

As a part of the CBI designation process, potential beneficiaries consulted with the Office of the Trade Representative and the Department of State in order to assure the U.S. government that CBI eligibility criteria, including protection of intellectual property, were met. The representations of CBI beneficiaries on copyright may be summarized as follows:

> o With respect to the unauthorized broadcasting of copyrighted materials by government entities, all CBI beneficiaries asserted that they would not, in the future, engage in such activities without the express consent of concerned copyright holders. Most stated that they were not engaging in such activities at present;
>
> o With respect to the unauthorized broadcasting of copyrighted materials by nationals, all CBI beneficiaries either pledged to take steps to assure that this does not take place, or noted that their local law prohibits such conduct and assured the United States that its copyright holders had standing to seek the protection of such laws;
>
> o With respect to providing "adequate and effective protection" of United States copyrighted materials, CBI beneficiaries generally did little more than call attention to the existence of local copyright law, usually the 1911 or 1956 Copyright

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180/ PUB. L.98-67, §212(c)(9) and (10)

Acts of the United Kingdom. Several states indicated that they were in the process of revising their copyright laws.

CBI and Satellite Signal Poaching. The CBI may lead to formalizing copyright licensing arrangements governing transmissions of copyrighted programming in the region. Virtually every CBI beneficiary declared their interest and willingness to facilitate negotiations between broadcasting authorities and rightsholders in order to secure broadcast licenses for their territory. In particular, St. Christopher and Nevis stated:

> We should like to note here that future negotiations with copyright holders may be done under the auspices of CARICOM, as appropriate, or may be done in concert with other member states in the Caribbean region. 181/

There is some indication that United States copyright interests recognize the need to modify their licensing activities in the region to meet the emerging transmission technologies in a multilateral and institutionalized manner.

CBI and Book Piracy: The CBI certification process for the Dominican Republic underscored its book piracy problem and laid a foundation for clarifying the eligibility of United States works expected to be protected. In addition to representations concerning the protection of United States works on the basis of national treatment, the Dominican Republic specifically addressed the book piracy problem in its statement requesting CBI designation. In particular, the Dominican Republic represented that (1) eligibility for protection did not hinge upon local registration; (2) standing to file

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181/ Letter of the Honorable Kennedy A. Simmonds, Prime Minister and Minister of Foreign Affairs, to the Honorable George Shultz, Secretary of State, October 6, 1983, at 7.

criminal complaints existed; (3) cooperation of police authorities would be available; and (4) that no bonding requirements beyond those applied to nationals would be imposed. Most important, the government indicated its intention to revise its Copyright Act, including more effective remedies against copyright piracy, and to adhere to the UCC. [182]/ Since making these representations, the Dominican Republic has, in fact, adhered to the UCC.

Although one may infer that the CBI was used to "interfere" in the domestic law of the Dominican Republic, the Copyright Office does not believe this to be the case. The problem which gave rise to United States involvement in this matter was systematic piracy, not even under the color of serving local educational needs. [183]/ United States government and copyright holder representations did not seek to project its law upon the Dominican Republic. Rather, the representations centered on eligibility for national treatment. Neither did they seek to end piracy by any means. Instead they sought the Dominican Republic's adherence to the UCC -- an objective which serves all countries and which has been achieved. The Dominican Republic's adherence to the UCC serves the interests of its nationals as well as those of the United States; as an LDC, that country is afforded UCC benefits intended for such countries.

Nigeria:

The recording, motion picture, and book publishing industries appear agreed that Nigeria is the African market most deeply affected by copyright piracy. Piracy of sound recordings in Nigeria is estimated to be as high as

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[182]/ Enclosure to the letter of November 11, 1983 from His Excellency Jose Agusto Vego Lambert, Secretary of State of Exterior Relations of the Dominican Republic, to the Honorable George Schultz and Ambassador William E. Brock, at 8-9.

[183]/ See supra, note 176.

80-90% of the national cassette market, with estimated sales of twenty million illegal copies. [184]/ Figures on video piracy are not available, although industry publications note only that pirated video product in Nigeria is plentiful, derived from off-air recordings, from the importation of pirated copies manufactured elsewhere, and from the importation of lawfully manufactured copies in violation of territorial distribution limitations (so-called "parallel imports", which are clearly an infringement of distribution rights under the copyright laws of many countries, but not often thought of as "piracy"). [185]/

As with the motion picture industry, book publishers have been unable to estimate monetary losses due to piracy in Nigeria. Foreign publishers have noted, instead, that the Nigerian Publishers Association "is now suggesting that 25% of the market could have been taken by pirated editions." [186]/

By all accounts, the piracy situation in Nigeria is severe -- most severe for sound recordings, perhaps somewhat less for motion pictures and books. An examination of Nigeria's copyright laws deepens, rather than explains, the problem of why this should be so.

Nigeria has long been at the forefront of Anglophone African states in the recognition of the rights of foreign authors and copyright owners through international agreements. Since 1962, Nigeria has adhered to the UCC Unlike the case with other former colonies of the United Kingdom, Nigeria did not have the UCC extended to its territory by act of the colonial power. As a result, the United States has direct copyright relations with Nigeria.

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[184]/ M. Edwards, "Audio Piracy," MEDIA LAW 115.

[185]/ E. Greenspan "Film and Video Piracy," MEDIA LAW 123.

[186]/ R. Machesney, "Book Piracy: An Overview," MEDIA LAW 129.

The Copyright Statute of Nigeria dates from 1970 and, in somewhat truncated form, is patterned upon the United Kingdom model. [187] The law fully extends copyright protection to literary works, cinematograph films, and sound recordings. [188] Copyright owners of books and films are accorded rights to control the reproduction and communication to the public of their works [189] . Sound recording copyright holders have the exclusive right

> ...to control in Nigeria the direct or indirect reproduction of the whole or a substantial part of the recording either in its original form or in any form recognizably derived from the original. [190]

A generally adequate basis to enforce copyright against local private manufacturers is complemented by statutorily granted rights against importation of infringing copies for purposes of trade. [191] Remedies available to copyright owners are broadly phrased to include "all such relief by way of damages, injunctions, accounts or otherwise ... as is available in any corresponding proceedings in respect of infringement of other proprietary rights." [192] While unknowing infringers may have their liability for damages limited to profits, willful or flagrant infringers may be exposed to exemplary damages "as the court may consider appropriate in the circumstances." [193]

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[187] Law No. 61 on Copyright, December 24, 1970, reprinted in CLIW, Nigeria: Item 1.

[188] Id., §1.

[189] Id., §5(1)

[190] Id., §7.

[191] Id., §11(b).

[192] Id., §12.

[193] Id., 12(2) and (3).

In short, through international agreements and domestic legislation, Nigeria is a state in which foreign copyright holders would expect to receive "adequate and effective" protection. Yet it is a place where they do not find such protection and piracy flourishes. Why?

First, as publishers have observed:

> ...the enforcement of industrial and intellectual property rights in Nigeria is a slowly developing process and apart from the usual problems of obtaining prompt action through the police or through the courts it is felt that there could be a misplaced sympathy in the courts for small traders who are seen as being oppressed by large companies with international connections. [194/]

Second, in the past, foreign and local copyright interests did not appear to have organized an effective campaign against Nigerian piracy. (The situation now is changing. The United Kingdom and Nigerian Publishers Associations have recently established contacts between their respective anti-piracy Committees. The IFPI has recently inaugurated an anti-piracy drive in Nigeria to deal with sound recording and video piracy. The motion picture industry has its own lobbying efforts, partially in conjunction with IFPI's video interests.)

Third, the criminal penalties for copyright piracy prescribed in Nigerian law have little more than nuisance value given the size and profitability of piratical activities. As noted elsewhere, copyright industries vulnerable to piracy are nearly unanimous in their belief that only criminal proceedings offer an effective means to combat high levels of commercial copyright piracy. Police and prosecutional officials perhaps are reluctant to mount the time-consuming investigations and trials which complex video and audiopiracy cases entail, when a fair finding of "guilty" means but a token fine.

[194/] R. Machesney, "Book Piracy: An Overview," MEDIA LAW 129.

Taiwan:

For over thirty years, Taiwan has been a major center for book piracy. [195/] Until recently, however, it was essentially a cottage industry serving the local and prosperous Taiwan market.

Today, technology and a greater economic presence in the Pacific have changed the face of this "industry":

> Modern offset printing techniques have made it easier to photograph and reproduce a good quality copy of the page, and the pirates realising the large profits to be made, have widened their activities to produce not only important reference works, but also well established university and school textbooks. Two separate pirate editions were printed of the 20-volume New Grove Dictionary of Music and Musicians which retails at over £1,000. The pirate editions of this major scholarly work sell at US100 and copies have been offered for sale in the U.S. [196/]

Taiwan-based book pirates now export illegal editions of copyrighted works in quantity as evidenced by the much publicized seizure in Port Harcourt, Nigeria of ship-containers of books, originating in Taiwan. Earlier, a similar large shipment was detained in Taiwan, again, bound for Nigeria. [197/]

[195/] An excellent history of Taiwan-United States conflicts over book piracy is D. KASER, BOOK PIRATING IN TAIWAN (Philadelphia: 1969). Professor Kaser is presently at the Indiana University Graduate Library School.

[196/] Machesney, "Book Pirating," op. cit., 130.

[197/] Id.

The Association of American Publishers (AAP) recently has begun to monitor the impact of Taiwan book piracy on United States publishers. According to AAP estimates, twenty-seven major United States publishers have had over 450 titles -- including professional and college textbooks, reference works, and "STM" materials -- pirated in Taiwan within the last year. 198/

Taiwan's defenders have attempted to turn this focus on educational publications to a moral advantage, arguing:

> Per capita income in the Republic of China is only $125 per annum. An average white collar worker earns only $30-$40 a month. Correspondingly, the cost of living is low. The tuition at the National Taiwan University, the best on the island, is $9 per student each semester, or $18 a year. Private universities charge about double that amount. Therefore, it would be folly to expect a Chinese student to pay $5 to $17.50 for a textbook. He has never been able to afford such a luxury, cannot afford it now, and will not be able to afford it in the foreseeable future. But he has to have books for his studies. 199/

These arguments were, however, forcefully rejected by United States publishers:

> ... the motivation of the book reprinters in Taiwan today is to put it bluntly, a love of money rather than a love of learning. And it is on this point that one must reject... the assumption that the Taiwanian reprinters are primarily concerned with the production of low-priced textbooks for local students. This raison d'etre puts a fine moral face on their operations, and it has, of course, a strong emotional appeal to everyone, especially to those who are uninformed on the true nature of the commerce of the book pirates in Taipei. In actual fact, if the reprinters were to confine their effort only to answering the needs of the needy college students in Taiwan, there would be very little profit in it for them -- so little that their operations would quickly shrink to a volume so small that it would give little concern to U.S. publishers. This is obvious to

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198/ These figures were gleaned from submissions by the AAP to the Office of the Pacific Basin, International Trade Administration, in preparation for the April, 1984 Copyright Consultations between the AIT and CCNAA. (The acronym "STM" describes scientific, technical, and medical publications.)

199/ Loh, I-Cheng, "Copyright: A Chinese View," 105 Publishers Weekly 22, 25 (March 30, 1964).

> anyone who knows Asian book markets, knows the economics of book production and distribution, and knows the lists and methods of the major reprinters in Taipei. Obviously the reprinters must make their profits on the export of reprinted textbooks and technical books and on the local sale of basic reference books and best sellers, reprinted for English-speaking residents and visitors in Taiwan. 200/

This exchange typifies the quality of much of the United States-Taiwan copyright dialogue. Recently, however, the International Trade Administration of the Department of Commerce initiated a new phase in this dialogue. Under the auspices of the American Institute in Taiwan (AIT) and the Coordinating Council for North American Affairs (CCNAA), trade and intellectual property officials of both sides met in Taipei between April 23-30, 1984, to consider ways to improve bilateral copyright relations.

A wide range of United States copyright concerns were discussed within the framework of Taiwan's proposed new Copyright Act. While not entirely free of disagreements, the general assessment of the discussions was that they were productive, and that given goodwill on both sides, an agenda for improvement of copyright relations has been identified and can be met.

In the view of the Copyright Office, these discussions were important because they disclosed fundamental changes in Taiwan's copyright policies, moving toward internationally recognized copyright norms. (These changes do not appear to be a short-term reaction to possible loss or limitation of GSP benefits.)

First, the economic maturation of Taiwan has generated pressures to fit copyright more harmoniously into its global trade and development policies. Perceiving its future to be closely linked to the growing information economies of the West, Taiwan is weighing copyright policies in terms of how they

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200/ C. Benjamin, "A U.S. Publisher's Reply," id., 23.

may promote and attract copyright industrial activity and local authorship in high technology, thereby serving as a stabilizing factor in its international commercial relations. This is a fundamental shift from viewing copyrights as property rights only owned by foreigners and only exercised against nationals.

Second, the proposed Taiwan Copyright Act reflects this emerging copyright maturity: penalties against piracy are strengthened; basic economic rights of authors are set out with a detail appropriate to modern means of exploiting works; minimum civil damages are provided; and new media of creation -- such as computer software -- are expressly recognized as the subject matter of copyright. Even the decision by Taiwan authorities to provide limited exemptions for educational text production is, in fact, a major step away from the often moralistic justifications of piracy based upon local educational needs. Although the proposed exemptions are, to United States experience, overly broad, the activities sanctioned are far less damaging than those tolerated during the hey-day of Taiwan book piracy.

Third, United States copyright industry representatives participating in the discussions were given a brief, but useful, education on the need for private sector initiatives to complement official action in improving the Taiwan copyright climate. These include: (1) domestic licensing of works under terms which permit realistic pricing of authorized editions; (2) resort to local remedies; and (3) active efforts to enforce rights, including significant increases in the number and variety of United States works registered for copyright protection in Taiwan.

Taiwan, to be sure, is interested in obtaining a share of export markets as well as supplying its own. And to date, Taiwan has supplied some other markets with piratical copies. This Report has already mentioned the widely publicized seizure of Taiwan-pirated books in Nigeria. Piracy should, of

course, be curbed. No legitimate booksupplier, whether publishing his own list or or the works of others under license, can provide books at prices competitive with pirates, who simply do not incur the basic costs of book development. But Third World countries need books at prices affordable by their populations. Again, United States book publishers can help themselves by exploring how to exploit and serve such markets through foreign licensees and co-publishing ventures. Indeed, this mode is being used increasingly by publishers, including those of the United States, in the Peoples Republic of China. And such joint enterprises can serve not only a given country of book production, but other Third World countries as well; and they will likely do so in any event. But it will serve users and publishers alike if the former are supplied with authorized copies from cooperative ventures: lower production costs can be achieved, prices accordingly covered, markets expanded, pirates' activities undercut, and indigenous copyright industries within the Third World fostered. The solution, in short, is not to deny Third World needs with copyright repression, but to supply it with rightly priced authorized copies.

The copyright dialogue among officials and private interests in both countries should continue with the assistance of AIT and CCNAA. In the view of the Copyright Office, the possible success of this dialog will be enhanced if the United States government and publishers transcend their inclination to pressure in generally "threatening" ways and, instead, embrace a program of close cooperation in which the objectives are protection under copyright for foreign rightsholders and prosperity under copyright for Taiwan's obviously talented book manufacturers and distributors. 201/

201/ Professor Kaser observed, some fifteen years ago:

> It has been said that if twenty American publishers and

PART THREE: LEGISLATIVE PROPOSALS IN THE UNITED STATES

Introduction

During the 98th Congress, a number of bills have been introduced addressing the problem of inadequate or ineffective protection abroad of United States intellectual property. These proposals often centered around two concepts: (1) The need to integrate service-sector economic activity into the Trade Act of 1974; and, (2) the terms under which the Generalized System of Preferences, due to expire at the end of 1984, might be renewed. A number of other proposals have been made to increase penalties for commercial counterfeiting, including importation for public distribution since, as in the copyright area, a major market for counterfeits or piratical copies of certain kinds of works, is the United States itself.

This section of the Report will outline features of the major proposals and address issues concerning their form and substance.

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twenty Taiwan reprinters could sit down together for two days, the entire problem of piracy would be solved. Although there may be some wishful thinking reflected in this statement, there can also be little doubt that such a confrontation would ameliorate the situation greatly. It would at least prove to Western publishers that the Taipei trade is peopled in part by gentlemen of integrity and honor rather than by unprincipled scoundrels, as they have so often been painted in Western accounts; Taiwan booksellers furthermore would come to realize that American publishers are indeed concerned about the need for low-priced books... rather than being interested only in maintaining sky-high prices and vast profits. KASER, BOOK PIRATING IN TAIWAN 142. (Philadelphia:1969).

S. 1718, to Amend the Trade Act of 1974 to Renew the Authority for the Operation of the Generalized System of Preferences, and for Other Purposes, 98th Cong., 2d Sess. (1984)

This proposal, introduced by Senator John C. Danforth of Missouri, would extend the Generalized System of Preferences (GSP), scheduled to expire January 3, 1985, until January 3, 1995. Its significance to intellectual property rightsholders lies in the inclusion of "a potential beneficiary country's treatment of U.S. intellectual property rights..." 202/ , among the list of factors which the President must consider in determining country and product eligibility. Similar in approach to the Caribbean Basin Initiative, S. 1718:

> a) makes clear that a country be denied beneficiary status if it expropriates either intangible or tangible forms of property of United States nationals (including intellectual property) without the procedural process of compensation required by international law;
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> b) requires the President to consider, in affording GSP status "the extent to which a country is providing under its law adequate and effective means for foreign nationals not only to secure, but also effectively to exercise and to enforce, exclusive rights in intellectual property;" 203/ and,

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202/ Senate Report 98-485, on S.1718 Renewal of the Generalized System of Preferences, 98th Cong., 2d. Sess., May 24, 1984, at 10.

203/ §4(b), S. 1718, 98th Cong., 1st Sess. (1984); S. Rept. 98-485, at 11.

c) authorizes the President to withdraw, suspend or limit GSP eligibility for countries which cease to comply with eligibility criteria, including those relating to the protection of intellectual property. 204/

The Report of the Senate Finance Committee accompanying S. 1718 is cognizant of the inherent flexibility of the general standard of "adequate and effective" protection:

> The Committee recognizes that the new subparagraph (5) does not provide a single, objective test for determining whether the law of a foreign country provides adequate and effective protection for intellectual property, because this is not a standard susceptible to such a simplistic test. It is anticipated, however, that the President will consult with appropriate parties, including the U.S. Copyright Office and the Patent and Trademark Office, to fashion a set of criteria to be applied consistently and objectively. 205/

Nevertheless, the report does detail the types of factors which the President should "consider" in providing GSP beneficiary status:

> the extent of statutory protection for intellectual property (including the scope and duration of such protection), the remedies available to aggrieved parties, the willingness and ability of the government to enforce intellectual property rights on behalf of foreign nationals, the ability of foreign nationals effectively to enforce their intellectual property rights on their own behalf, and whether the country's system of law imposes formalities or similar requirements that, in practice, are an obstacle to meaningful protection. The term "foreign nationals" is intended to refer to U.S. nationals and nationals of other countries with whom U.S. nationals have a contractual or similar relationship with respect to the sale or licensing of intellectual property: for example, a non-U.S. licensee of the rights owned by a U.S. national. 206/

204/ S. Rept. 98-485, at 13; §4(a), S. 1718, 98th Cong. 1st Sess. (1984).

205/ S. Rept. 98-485, at 11.

206/ Id.

Issues and Discussion:

Few would dissent from the proposition that beneficiaries of valuable trade privileges in the United States should recognize and respect legal forms of protection for United States goods and services in their markets. While the President may, under existing GSP law, grant or withhold GSP status based upon disregard for United States intellectual property rights, it is appropriate specifically to declare piracy and counterfeiting to be unacceptable commercial behavior.

Questions concerning S. 1718 go more to form than to principle: (1) will GSP eligibility serve as an incentive for certain states to upgrade their protection of intellectual property?; (2) is the standard of "adequate and effective" protection sufficiently clear?; and (3) should adequate and effective protection of intellectual property be made a mandatory eligibility requirement?

As to the first question, the Copyright Office does not offer an answer. On the one hand, GSP is important to the securing of finance and direct investment in the local economy of several countries. Whether eligibility in general, or for specific products, is sufficiently valuable to serve as an incentive for protection of foreign intellectual property will depend entirely upon ad hoc circumstances. Furthermore, some countries eligible for GSP, including major centers of piracy, may be approaching graduation from GSP status (or important exports may be subject to graduation). Thus, GSP may be of marginal importance in states such as Singapore, where piracy itself appears to be a significant element of export trade. There will, nevertheless, doubtlessly be occasions when the granting or denial of GSP benefits can

factor into United States efforts to protect intellectual property abroad; and there is no reason to reject a useful tool because it may not always be effective.

As to whether the standard of "adequate and effective" protection is imprecise, the Copyright Office can only agree that it is. By adopting the widely accepted concept governing UCC obligations, S. 1718 should be entirely compatible with the laws and practices of UCC states. Many of the states to which GSP is of interest, and wherein copyright piracy is endemic, however, are not members of the UCC. There is an argument in favor not only of adopting the language of Article I of the UCC to GSP eligibility criteria, but also of determining the extent to which "adequate and effective" copyright protection exists with reference to the prevailing laws of UCC members at similar stages of development as those nations seeking GSP status.

For potential GSP beneficiaries which are members of the UCC, a failure to meet the eligibility requirement of copyright protection should necessarily involve such states in violations of the UCC. Further, the laws and practices of developing countries in the UCC commonly contain reasonable exemptions, limitations on rights, and compulsory licensing arrangements, compatible with "adequate and effective" protection, even though particular United States interests may find them objectionable. Thus, as long as the GSP copyright eligibility requirements are understood to mean "adequate" (not "the sky's the limit") and "effective" (not unimaginably Draconian), the standard should be compatible with multilateral copyright objectives.

Finally, the question of whether the President's authority with respect to copyright eligibility criteria should be mandatory or discretionary is one upon which the Copyright Office defers to the Office of the United States Trade Representative, because they must do the negotiating and because their

experience is more relevant to the ultimate issue: which is the best and most flexible tool to achieve United States negotiating objectives? Here, the Copyright Office only notes two, perhaps obvious, points. First, given the standard of "adequate and effective" protection, a mandatory eligibility requirement may simply refocus Presidential discretion to interpreting what is "adequate and effective." Second, the question may really be whether the Executive will use a discretionary authority with real vigor. In this regard, the evidence to date indicates that the Executive will. The opportunity for Congressional oversight is a part of GSP and the practical application of the "adequate and effective" standard might appropriately be considered by the House and Senate Judiciary Committees as part of their copyright oversight responsibilities.

2. H.R. 3398 and S. 144: An Act to Change the Tariff Treatment with Respect to Certain Articles and for Other Purposes, 98th Cong., 1st Sess., (1983)

Both H.R. 3398 and S. 144, introduced by Congressman Sam M. Gibbons of Florida and Senator John C. Danforth of Missouri, respectively, would more fully integrate the nation's growing service sector, including those industries exporting intellectual property, into United States international trade policies. Of particular interest are the proposed enhanced definitions of "unfair," "unreasonable," and "unjustifiable" trade practices for purposes of the 1974 Trade Act to permit the President to retaliate against such practices affecting intellectual property. "Unreasonable" practices would include those which deny "fair and equitable provision of adequate protection of intellectual property rights," regardless of whether such practices are consistent

"with the international legal rights of the United States." [207] "Unjustifiable" practices by United States trading partners would include policies or practices "inconsistent with the international legal rights of the United States," expressly including:

> ...any act, policy or practices...which denies national or most-favored-national treatment, the right of establishment, or protection of intellectual property rights. [208]

The proposals would also integrate the protection of intellectual property into the United States' basic negotiating objectives, through the establishment of express objectives concerning services, foreign direct investment and high technology products. Of special interest to the information industries are those negotiating objectives relating to services and high-technology products. As to the latter, H.R. 3398 and S. 144 would add to existing objectives, such as obtaining "the maximum openness with respect to international trade and investment in high technology products and related services, eliminating trade distorting policies and practices, eliminating discriminatory measures," [209] the further objective:

> to provide effective minimum safeguards for the acquisition and enforcement of intellectual property rights and the property value of proprietary data. [210]

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[207] §304(2), H.R. 3398, An Act to Change the Tariff Treatment with Respect to Certain Articles and for other Purposes, 98th Cong., 1st Sess.

[208] Id.

[209] Id., §305.

[210] Id.

Issues and Discussion:

Commerce in United States-origin films, television programming, music, sound recordings, literature (both fiction and informational), and goods and services associated with the creation, manufacture, and distribution of copyrightable works has dramatically increased since the 1950's. Copyright exports of these works continue to grow. As a result, it is entirely appropriate to place United States intellectual property industries upon an enhanced footing in its trade policies and negotiating structures. It is, however, a source of frustration that a fairly precise understanding of the scope of commercial activity in copyrighted works, is difficult to come by. Profiles of copyright industrial activity, particularly of exports, do not exist; and at the request of the Senate Subcommittee on Patents, Copyrights, and Trademarks of the Committee on the Judiciary, the Copyright Office is presently working with the Department of Commerce on ways to enhance government economic data collection for copyright industries as well as to measure, as accurately as possible, current production and trade.

The worldwide video explosion has been fueled, to a great degree, by two forms of innovation and entrepreneurship: that of Japan's hardware manufacturers and the inventory of the United States film industry. Both are the object of a variety of trade-distorting practices, laws, and policies in many countries throughout the world.

The quality of copyright protection is one important element in determining the access United States works may enjoy in a particular foreign market. Other elements, noted earlier, include stiff quota restrictions upon importation of copyrightable matter, and restrictions on doing business in a national territory. These practices, in many cases, would come within the multilateral and bilateral trade negotiating concerns of the government.

There may be a practical relationship between the quality and diversity of opportunities for United States copyright industries to do business in foreign countries and the requirements for adequate and effective protection of copyrights. While all legitimate avenues of exploitation deserve reasonable copyright protection, the strict control by foreign governments of market opportunities for United States works to minimum levels of product availability may make effective remuneration or control over product distribution much harder to achieve. In fact, it may be observed that in a number of places where restrictions upon the importation and exploitation of theatrical films exist, the net effect has been to promote and, indeed to insulate, video piracy.

Concern has been raised in some quarters about the application, under the proposals, of section 301 remedies under the Trade Act to allegedly "unreasonable" or "unjustifiable" trade practices in the case of states with whom the United States has copyright relations through the UCC. It is conceivable that the definition of an "unreasonable" trade practice could include legal regimes compatible with the UCC, but nevertheless deemed unacceptable to particular United States industries, thereby triggering application of section 301 remedies.

For example, reprint and translation licensing regimes available to developing countries under the UCC and Berne Conventions are viewed generally by copyright holders as inherently unfair and coercive. Should the establishment of such licensing regimes by a developing country give rise to the possibility of trade based retaliation?

On the one hand, there are reasons why the answer may be "yes," at least as a matter of principle. The compulsory licenses provided for developing countries in the UCC and Berne Conventions essentially are based on commercial

trading concerns, inherently distort trade in eligible materials, and may be implemented as a part of the country's over-all balance of payments, or other trade policies. It would appear appropriate, therefore, for United States negotiators to be able to deal with the trade problems arising out of LDC compulsory licensing in the context of total trading relationships.

On the other hand, it is clear that the compulsory license regimes under the UCC and Berne Conventions are important options to the Third World. While the UCC makes clear that material reciprocity requirements may not be imposed by a developed country in respect of an LDC's implementing the Convention licenses, a question remains whether such reciprocity constraints refer only to those under copyright law. Thus, it is possible that any material retaliation against an LDC involving the compulsory licenses could violate the spirit of the UCC and damage comity in the international copyright community. Taken only in its political dimension, any attempt to seek revisions of multilateral copyright treaties, through the enhanced concept of unreasonable trade practices(particularly as to certain compulsory licenses) runs the great risk of being viewed as a repudiation of difficult compromises embodied in the 1971 revisions of the UCC and Berne Conventions.

The Copyright Office would expect that the question of whether a particular foreign copyright regime constitutes an unreasonable trade practice will be based on an analysis by competent government agencies of factors similar to those used in determining whether a foreign law provides "adequate and effective" copyright protection. That is, the question would be decided with substantial reference both to effects upon trade and also upon the prevailing practices of states party to the UCC and Berne Conventions.

In the final analysis, the questions posed by H.R. 3398 and S. 144 involve similar problems of uncertainty and lack of a traditional basis for analysis of copyright issues as were noted in connection with S. 1718. Perhaps, as in the case of S. 1718, uncertainty over what constitutes an unfair trade practice in intellectual property should not obscure the desirability of adding tools by which the government can deal more effectively with practices which are patently unfair. Further, the requirements for reporting to the Congress and for the impartial adjudication of copyright-based unfair trade practice complaints respectively provide an opportunity for the Congress to assure that new rights or remedies are rightly reconciled with multilateral copyright treaty obligations and objectives and safeguards against abuse.

S. 2549, A Bill to provide Additional Protection of the Intellectual Property Rights of United States Nationals in Foreign Countries, 98th Cong., 2d. Sess. (1984).

This bill [211], introduced by Senator Frank R. Lautenberg of New Jersey, attempts a comprehensive approach to developing an international copyright policy for the United States. It moves towards this goal by:

> 1. Establishing a procedure whereby a comprehensive review of the intellectual property protection available to United States authors and their works may be conducted by the President, with input from the private sector, and communicated to the Congress; [212]
>
> 2. Declaring ineligible for designation as a GSP beneficiary any otherwise eligible country which fails to both: (a) adequately and effectively to protect intellectual property in its acquisition, exercise, or enforcement;and (b) to assume a constructive role in international negotiations for

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[211] S. 2549, A bill to provide additional protection of the Intellectual Property Rights of United States Nationals in Foreign Countries, 98th Cong., 2nd Sess. (1984)

[212] Id., §2

the protection of intellectual property under treaties or conventions to which the United States and a potential GSP beneficiary both adhere; [213]

3. Permitting the President to withdraw or suspend existing GSP eligibility for duty-free treatment for failure to comply with the requirements noted in paragraph (2), above; [214] and

4. Establishing a United States government program of cooperative and technical assistance in the fields of intellectual property, directed toward developing and newly industrializing countries. [215]

Issues and Discussion:

While the reporting requirements of S. 1718, previously discussed, could provide both useful information regarding industry problems and Presidential tools to deal with them, there is little doubt that the comprehensive overview contemplated by S. 2549 affords a sounder basis upon which to develop a harmonious interplay of bilateral and multilateral copyright initiatives.

An international intellectual property rights protection review, done on a country-by-country basis, would furnish a valuable data base for United States government policy-makers. Further, the obligation of the Executive to report to the Congress the results of the review, including recommendations for United States initiatives, negotiating priorities, or other actions, would enable Congress to satisfy itself that trade initiatives conform with established multilateral copyright policies.

The differences in treatment of GSP eligibility and the requisite protection by beneficiaries of United States intellectual property under S. 1718 and S. 2549 appear to be matters of detail. By somewhat different routes, both

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[213] Id., §3.

[214] Id., §3(c).

[215] Id. §4.

bills create new GSP eligibility requirements relating to intellectual property and call for the President to report to the Congress on compliance by GSP designees with these criteria. In addition, S. 2549 would authorize the President to furnish assistance to less developed and newly industrializing countries,

> ...for the purpose of supporting the development and enhancement of effective systems for the protection of intellectual property rights in such countries, including support for the administration and enforcement of laws which effectively protect intellectual property rights....[216/]

United States copyright industries, particularly those concerned with piracy, desire prompt action taken against piracy in terms of new and vigorously enforced criminal laws, and view training programs with some skepticism. But to deter piracy will require cooperation, training, and assistance; specifically, consulting with local police and customs officials in setting priorities for action, establishing procedures to invoke new or enhanced enforcement options, and facilitating information channels concerning the ownership of, or rights under, copyright. Thus, in the long term, "technical assistance" may permit the opening of a result-oriented dialogue with states where intellectual property is poorly protected, looking toward reasonable steps which can be taken to remedy the commercial injustices of United States rightsholders on terms which bring the other state closer to acceptance of basic international copyright norms.

Finally, as a practical matter, S. 2549 provides a vehicle for an institutionalized way to present to concerned countries expectations of the United States concerning adequate and effective copyright protection, rather than relying on a vague standard of commercial or legal conduct. In this manner,

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[216/] Id.

the proposed assistance program also will enable the United States to address, in a constructive and progressive fashion, the modernization (or establishment) of reasonable copyright systems thereby minimizing disruptions to the GSP program.

S. 875, A Bill to Increase the Penalties for Trademark Counterfeiting and Other Purposes, 98th Cong., 1st Sess. (1983)

This proposal, introduced by Senator Charles McC. Mathias of Maryland, would increase dramatically criminal penalties for trafficking in counterfeit goods or services. Its introduction came in response to increased distribution through importation of counterfeit trademarked goods manufactured abroad. The bill also would make willful counterfeiters vulnerable to treble damage suits brought by private rightsholders.

Issues and Discussion:

Copyrights are not directly affected by S. 875. Neither the increase in penalties, nor the proposed treble-damage remedy, is applied to "counterfeits" of copyrighted works, per se. A question arises, therefore, whether the provisions of S. 875 ought to be extended specifically to copyrighted works or whether the Copyright Act itself should be amended to reach results similar to S. 875.

Both criminal and civil penalties for willful copyright infringement have been increased substantially over the last decade. There is, however, some sentiment in favor of further increasing criminal penalties for copyright infringement, as inflation takes the sting out of the existing penalties. On the other hand, the escalation of criminal enforcement in copyright has stirred some anxieties as to fairness and other law enforcement priorities. If

faced with calls for an increase in criminal copyright infringement penalties, the Congress may do well to take that opportunity to review the application of existing criminal remedies to contemporary copyright infringements and their existing status in the level of criminal enforcement priorities.

Notwithstanding, the trademark remedies proposed by S. 875 would, of course, be of value to United States copyright owners insofar as counterfeiting may infringe associated trademark rights in authorized copies of creative works.

PART FOUR: CONCLUSIONS AND RECOMMENDATIONS

General Observations

This Report has examined the variety of copyright problems confronting United States copyright owners throughout the world today against the backdrop of the international instruments and institutions which exist to secure author's rights. It also has reviewed present unliateral actions which have been implemented and those being considered by the United States to induce greater respect abroad for copyrighted works owned by its nationals.

The epidemic proportions of sound recording and motion picture piracy in some regions of the world call for immediate United States government responses and enactment of CBI was one such step. Conditioning valuable GSP benefits upon the recipient's degree of respect for United States copyrights is another response which our copyright industries believe must be taken. While there is no necessary taint or inconsistency with treaty obligations in exerting economic and political influence to promote intellectual property, it must be understood that such steps represent only a partial solution. The larger and more critical issue is how states <u>within</u> the international

copyright community adapt their copyright laws and practices to new technologies of creation, marketing, and use of protected works. And, unlike piracy, this task raises legitimate interests of users as fully as proprietors. Therefore, the Copyright Office believes that in order to secure world-wide copyright protection which international law recognizes as just and fair, without damaging the structures and procedures established in multilateral copyright treaties, the United States must strike a balance between unilateral "encouragement" and multilateral cooperation. And this balance must recognize the conflicting interests which are inescapable in domestic copyright policy-making.

The decisions which the government must make in reconciling competing interests of our nationals in domestic law must also be reflected in a reasoned approach to international copyright matters. As Dr. Arpad Bogsch aptly observed in 1964, while attending discussions on the revision of the 1909 Copyright Act:

> Looking upon your work -- that of the Government and that of the members of the Panel -- from the international viewpoint, it would be difficult to exaggerate its importance. To put it mildly, the whole copyright world is watching you, your work, with great hopes and expectations. After all, the United States leads today in every field of activity connected with copyright. Its authors' societies collect more royalties than those of any other country. Its book and periodical industry, its motion picture and phonograph record industry, its radio and television networks are the largest in the world. Because of its leading position in new inventions, the new technical devices for copying and transmitting are first tried out here and the legal implications are first tested here. Consequently, your work will have a great impact on the development of the copyright law all over the world. The world looks to you for inspiration to find equitable and practical solutions. 217/

217/ Remarks of A. Bogsch, at meeting on 1964 revision bill (August 7, 1964, New York City), in 5 COPYRIGHT LAW REVISION: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS 142 (comm. print: Sept., 1965).

This is even more true today than in 1964. So is the fact that efforts to secure copyright protection solely on behalf of one's own nationals may lead to negative repercussions in the development of international copyright protection on behalf of all authors. And the temptation within the international copyright community to seek ways of discriminating against foreign authors appears to be growing. Discriminatory regimes already have emerged in such tertiary areas as Public Lending Rights (PLR), photocopying, and "droit de suite"; they threaten to appear in primary areas such as cable television, off-air taping, and commercial lending rights. The consequences of this trend has been addressed by Ms. Elisabeth Steup of the Federal Republic of Germany:

> It is a real dilemma that very often it is the smaller states with a number of authors who in the interest of their national culture and in the interest of safeguarding the economic interests of their authors, feel compelled to legislate first. For authors with a normally restricted market for their works because of the language, an extensive protection is necessary. The detrimental effects of new techniques of reproduction of such authors' works without any compensation are very grave and call for immediate legislation to remedy the situation. For the national legislator, the adoption of a copyright solution implies, in view of the great number of protected foreign authors, a heavy obligation on its own nationals or public institutions. The chances for an adoption of a copyright solution including foreign authors will depend greatly on the probability that similar legislation will be passed in the other member countries of the international copyright conventions.
>
> An equivalent level of copyright protection in my opinion is essential for the future of international copyright, at least in those countries where new techniques of reproduction of protected works are widely used. I can understand the hesitation of developing countries to look for solutions to problems which for them are problems of the future, while they have a bulk of present and more urgent problems with which to cope. For a national legislator in a developed country, when deciding whether to adopt a copyright solution, the important consideration is the level of protection in other developed countries and whether the benefits he grants to authors from those countries are or will probably be balanced by equivalent benefits to his nationals. The work of the two intergovernmental copyright committees to study and prepare copyright solutions to

> problems created by new techniques in my opinion is of eminent importance, because this work can form the basis for equivalent solutions in all member states of the copyright conventions to safeguard international copyright and the interests of all authors. Authors and their associations in all countries should strive for an equivalent level of protection and for copyright solutions which include foreign authors. Certainly, a solution restricted to nationals may give national authors an immediate advantage and it is therefore very alluring. But in my opinion it is short-sighted, since solutions restricted to national authors will set examples for other national legislators and initiate a backward development from international protection to nationalism at a time when the international exchange in culture is growing and the international protection of authors is more needed than ever before. 218/

The present crisis atmosphere in copyright and the focus upon creating trade "leverage" with which to fight copyright piracy must not obscure the achievements of the multilateral systems in having promoted a generally congenial international climate for the creation and exploitation of intellectual works. Although one may argue that the UCC is too simple an instrument to regulate copyright in today's world, it continues to serve the invaluable purpose of securing eligibility of United States works for copyright protection, automatically and simply, in more than eighty countries. This function alone has been of inestimable value to authors in all UCC states. Membership in the UCC also has simplified the determination of applicable law in international situations; unlike arrangements based upon reciprocity, only one law need be applied to copyright questions arising in any UCC state: that state's own copyright law. Finally, the UCC embraces the core concept of international copyright: national treatment. In sum, the position of United States copyright owners under the UCC is far more predictable and secure than under the bilateral system relied on before 1956.

218/ E. Steup, "The Rule of National Treatment for Foreigners and its Application to New Benefits for Authors," 25 Bull. Copyr. Soc. 279, 289 (April, 1978).

It is therefore in the interest of the United States to work to accommodate national concerns with internationally accepted economic perogatives of all authors and rightsholders. Resort to extraordinary pressures upon governments to moderate anti-copyright policies need to be weighed carefully for their precedential and political impact upon the work of the international copyright committees of the two copyright conventions.

One can discern through the remarks of Dr. Bogsch and Ms. Steup another, and perhaps more awkward, problem: to what extent should the "adequate and effective" copyright protection the United States seeks abroad be a part of our domestic law? Will other nations follow the lead of the United States in the development of copyright policy? Can the United States expect to see protection in other nations laws greater than that provided in domestic law?

It may be unrealistic to assume that unilateral recognition of subject matter or exclusive rights by the United States will lead other nations to act similarly, as by the mere force of example. The leadership of the United States, however, will no doubt be essential in the development of an international consensus as a bellwether for other national legislatures and governments to reach sound standards of "adequate and effective" copyright protection. At a minimum, it will be unrealistic to expect other nations generally, especially developing nations, to adopt regimes of copyright protection more generous and more effective than that of the world's principal copyright-exporting nation.

The significance of this leadership will heighten in the years ahead as such issues as commercial lending rights, off-air recording, private uses generally, satellite transmissions, information storage and retrieval systems, international library cooperation, author-employer relationships, and computer software protection, are debated within the intergovernmental

copyright committees. It is strongly in United States interests to accept, within this framework, the challenge of multilateral cooperation and compromise. The success or failure of the international organizations in these areas will have profound consequences for copyright within the international copyright community. Further, those states outside the international copyright community may exploit any dissension or a failure to achieve a consensus as justification for self-serving anti-copyright positions at worst, or minimal copyright protection at best. For these reasons, and because of the essentially international nature of our copyright industries, the Congress should place as much emphasis on the international aspects of copyright legislation as on its domestic consequences. And consideration of the laws and practices of similarly situated foreign states should be an integral part of this process.

In considering the international consequences of domestic copyright policies, the Congress must chart a course between bilateralism and multilateralism; between trade and other foreign policy leverage and gradual consensus-shaping within the multilateral copyright systems; and, above all, between the need to protect both important industries and that tolerance of diversity which accepts less than strict reciprocity. These are the problems and challenges that Senator Leahy and Congressman Barnes have raised.

Piracy: A Matter of Urgency

The control of copyright piracy is a matter of urgency. While copyright-related events in states such as Austria, Canada, France, Japan, and Sweden may be more decisive for the future development of authors' rights than legal developments in the Pacific Basin and the Persian Gulf, it is necessary to focus first on copyright piracy. The reason for this is as simple as a basic

rule of first aid: first, stop the bleeding. The economic and political costs of piracy are too high and are felt all over the world. Economies of scale at national or global levels cannot be achieved when millions of illegal audio and video cassettes and books flood world markets. Enforcement costs are unacceptably high and, ultimately wasteful, and consumers in countries where markets are stable subsidize piracy through higher retail prices for legitimate product.

Politically, two problems arise out of piracy. The first is the criminalization of copyright infringement for at least certain works. While the Copyright Office believes that efforts to reduce large-scale piracy require strong penal measures, criminal sanctions must be developed and employed judiciously; excessive penalties may lead to a shift in public attitudes away from a basic respect for authors' rights to commercial regulation of copyright products; and it may also polarize pro- and anti-copyright positions in areas not directly related to piracy, such as off-air recording, commercial lending rights, and private copying.

The second political problem is international in nature. Over the long term, the great challenge to international copyright policy makers is to create commercially valuable international repertories. As this Report has demonstrated, there is a direct relationship between the quality of copyright protection in a given society and the health of its indigenous authorship. It is a clearer public good when piracy is suppressed in defense of one's own nation of authors, composers, performers, publishers, and sound recording and film producers, than when it is invoked solely in defense of foreign commercial entities. Some have regarded this point as a "make-weight", an effort to put a global face upon a problem of concern only to a handful of industrialized, wealthy, countries, but that is not so. It is an axiom of copyright

trade and of the principle of "national treatment" that foreign copyright holders depend in the long run upon the health of their local colleagues. The corollary of this axiom also is true: it is neither coincidence nor conspiracy that the basic representations United Kingdom and United States sound recording interests have been making to the government of Singapore in connection with copyright revision were proposals initiated by the local Singapore Phonograms Association.

Developing countries are already dependent upon industrialized states for important copyrighted material. Much of their approach to international copyright law has been determined by the wish to reduce the economic and social consequences of these dependencies. If copyright systems are to foster cultural development and reduce the costs of international copyright recognition to the Third World, piracy must be stopped, and copyright owners must fill the gap at fair prices.

Although copyright piracy has existed at significant levels in Europe, North America, and in many nations of Latin America, strong local creative communities with access to neighboring markets and interaction between local and foreign trade associations has permitted mobilization of interest groups pressing for more effective laws and their enforcement.

A number of further steps could be taken with respect to combatting piracy throughout the world:

- The United States government must accept, with vigor and a concern for all authors, the challenge to the integrity of international copyright posed by piracy. Attention and efforts should focus first on the widely recognized piracy centers of Kuwait, Saudi Arabia, Singapore, and South Korea. These states profit from access to United States markets and there is no reason to tolerate their systematic assault upon United States export markets for copyrighted works. Precisely because these four states see copyright protection as a trade matter, rather than as a matter of human rights, United States efforts to promote protection of intellectual property may appropriately be framed in trade terms.

Accordingly, the enactment of laws conditioning trade benefits upon the adequate and effective protection of United States intellectual property would provide a tool to encourage greater responsiveness to legitimate trade interests.

- o A fifth country where sound recording and book piracy thrives is Nigeria. A vigorous effort to secure more effective enforcement of existing laws is imperative. Unlike the four other major piracy centers, Nigeria has been a member of the UCC for more than a generation. More than most developing countries, Nigeria does have a publishing infrastructure, an anti-piracy organization, and copyright holders associations. In the midst of political and economic turmoil, Nigeria's ability or willingness to undertake an anti-piracy program may be limited. Because of Nigeria's cultural and economic importance on the African continent and throughout the world, however, the Copyright Office would encourage the United States and other concerned UCC states to seek a negotiated solution to the chaos of Nigerian copyright markets, free of unilateral trade retaliation pressures and in cooperation with other states including those in Africa.

- o The EEC decision to develop legal measures to secure the Community's cultural markets from piracy ought to be both encouraged and examined closely by all states and by WIPO and UNESCO.

- o The United States Customs Service and trade agencies, such as USTR, along with competent customs authorities of all concerned countries, should establish close cooperation, including exchanges of views and techniques for identifying and excluding piratical copyright goods from national markets. Standardization and reasonable simplification of procedures, concerning the right to exclude certain articles, bonding requirements if any, and the impoundment and disposition of infringing copies, is desirable.

- o Although differing civil and criminal legal systems cannot be reconciled in the short term, the threshold problem of establishing the existence and ownership of copyright in works which have been pirated could be settled on an international basis. Presently, WIPO is exploring the feasibility of creating a voluntary international register of audiovisual recordings in order to expedite anti-piracy actions in participating states and to facilitate the effective licensing of works throughout the world -- itself a strong deterrent to pirates. The United States should support and participate in this effort, and has already done so.

The Politics of Book Piracy: A Cautionary Note

Book piracy and international copyright protection for literary materials have always raised sharp differences between rightsholders in industrialized states and consumers in developing countries.

Because the commercial focus of book piracy is commonly text and professional literature, the ultimate consumers of piratical copies of works are often universally favored classes: students, teachers, researchers, and professionals in developing countries. Given public attitudes regarding these preferred classes, the mere suppression of book piracy alone could strengthen public and governmental anti-copyright sentiments, rather than weaken them. The challenge facing copyright holders is to dispel the fear over book non-availability by serving consumers at locally reasonable prices and by helping to build local publishing through effective licensing programs.

The commercial stakes of piracy in the sound recording and motion picture industries may be greater than in book publishing, but the political and developmental implications of the functions of copyright in international book trade are fundamentally more important for the global future of authors' rights. After all, copyright has its historic origins in the book and it remains the central focus of the "North-South" dialogue of international copyright. As the Director-General of Mexico's Copyright Office observed in 1982:

> Educational demands and the needs of the less developed countries ("LDC's") furnish a forceful impulse in questioning the core of international copyright as rights of exclusion. As LDC's meet what they regard as too limited and complex accommodations of their quest in international

> forums, they react with understandable unwillingness to fight thoroughly for international copyright and only apply the agreed rules -- partially and half-heartedly. 219/

An objective of international copyright should be the isolation of the book pirate from the Third World markets they serve. Book pirates are not interested in the promotion of Third World educational objectives and are not "publishers" in the true sense the profession; they only produce and distribute cheap books written and brought to light by the labor and investment of others.

The Copyright Office believes that widespread book piracy in places such as South Korea and Taiwan can no longer be tolerated. In place of piracy, however, vigorous steps must be taken by the government and the private sector to assure that the marketplace meets the needs of these developing countries in which piratical copies of books are most widely distributed.

Far-sighted publishers, such as the late Curtis Benjamin, long recognized the need to orient United States publishing effectively and comprehensively towards the needs of developing countries. In his last work, United States Books Abroad: Neglected Ambassadors 220/ Mr. Benjamin respected the power and durability of the book for the transmission of the great variety of American values and opinion, and considered the promotion of the U.S. book abroad as serving broad foreign policy, as well as economic, interests. The internationalist perspectives of persons such as Mr. Benjamin, looking towards the

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219/ J. M. Teran-Contreras, "International Copyright Developments -- A Third World Perspective," 30 J. Copyr. Soc. 129, 132 (December, 1982).

220/ C. BENJAMIN, U.S. BOOKS ABROAD: NEGLECTED AMBASSADORS (Library of Congress:1984).

supply of low-cost books to the Third World, must be an integral part of efforts to strengthen the principle of copyright as a set of exclusive, proprietary rights in the Third World.

To that end, the Copyright Office urges that the Congress commence an inquiry into the position of United States books abroad. The inquiry should focus on the nature and extent of book piracy abroad and impediments to meeting the book needs of LDC's. Some of the questions which should be explored are:

- o The extent to which pirated copies of United States books substitute for authorized editions in Third World countries;
- o The ways in which LDC's acquire authorized editions of English-language educational materials through non-United States sources;
- o The means by which the United States government (principally USIA) and the private sector can encourage the wider availability of low-cost United States books to LDC's;
- o The proper role of international organizations in promoting the effective licensing and/or production of protected works for use in LDC's and assessing whether existing programs strike a fair balance between the rights of authors and needs of users; and
- o The feasibility of establishing, in as many LDC's as possible, cooperative agencies to publicize the availability of American books, and to facilitate licensing and other business transactions to make them available as widely as possible.

No one suggests that active programs to supply LDC's with low-cost books will totally curb book piracy. There is no doubt, however, that efforts to place local book markets on a legitimate footing to satisfy easily understandable needs for lowest cost educational materials may go a long way towards defusing local opposition to strengthening the position of foreign rightsholders.

Bilateralism and Multilateralism in United States International Copyright Policy

Ideally, international copyright protection ought to be established upon multilateral treaty obligations; and, as the settled content of copyright evolves, such changes ought to be made a part of international law. The review of international problems presented in this Report, however, suggests that a significant number of states, including those where piracy flourishes are, and may continue to be, reluctant to enter into multilateral copyright arrangements. A preference for multilateralism should not introduce excessive rigidity in United States copyright diplomacy with such states. The United States, therefore, should not insist upon UCC adherence by other states as the only way to enter into copyright relations; a willingness to conclude bilateral copyright agreements may be appropriate in particular cases.

Section 104 of the copyright law establishes the most flexible and appropriate method of concluding bilateral agreements; the occasions for Presidential proclamations establishing copyright relations can include, among others, trade agreements, bilateral investment treaties, and double taxation treaties.

The Copyright Office recommends that the United States government give serious consideration to formally requesting as a high priority, the establishment of direct, bilateral, copyright relations with states of the Pacific Basin and the Persian Gulf. It is particularly urgent to initiate this process in Kuwait, Malaysia, Singapore, South Korea, and Saudi Arabia as a way of suppressing piracy and stablizing markets in these regions.

"Unclear" Copyright Relations: An Unacceptable Situation

As discussed earlier, the United States has "unclear" copyright relations with a sizeable number of states. Not only is this "unclear" status a source of confusion and difficulty for United States copyright industries, it is also unfair to the authors of the concerned states whose works, arguably, are unprotected in the United States. Developing a genuine two-way trade in cultural materials between the industrialized and developing countries is a great task confronting the international copyright community. And that can only happen on the basis of global copyright recognition.

The Copyright Office believes that the United States government should consult promptly with the appropriate officials of states with whom copyright relations are deemed "unclear" in order to clarify the United States eligibility for copyright protection.

United States Government Efforts Toward Global Protection of Authors' Rights

Beyond the problem of copyright piracy lies the fundamental task of securing a level of copyright protection which not only rewards creativity, but encourages the creation of new works for widest dissemination. The vehicle for this effort should be through the modernization of the two world-wide copyright conventions to confirm their applicability to new forms of creative authorship and new uses of creative works.

In following through on this objective, however, it must be recognized that no single point of view can determine the international copyright policies of the United States. The task of the government may be foremost to coordinate effectively the many valid, and sometimes conflicting, copyright perspectives of public and private interests. Several steps have already been taken in this regard; other should follow.

First, the formation in 1983 of two Executive Working Groups: (1) the Working Group on Intellectual Property under the Cabinet Council on Commerce and Trade; and (2) the Senior Interagency Working Group on Intellectual Property, are useful organizational steps to coordinate the differing perspectives and expertise of agencies concerned with trade, telecommunications, and economic, and foreign policies, on the complex and rapidly evolving legal and technologic situations concerning copyrighted works.

Second, the federal government should prepare basic materials on the nature of intellectual property, its subject matter, industries affected, practical problems of marketing intellectual property, and piracy, in order to provide those agencies concerned with copyright policy a greater familiarity with the area. Particularly useful would be the systematic collection and dissemination from United States Embassies of information concerning the intellectual property climates in foreign countries, including: the levels of indigenous copyright, patent, and trademark activity; the infrastructures for the publication, distribution, and performance of protected works; and the identification of competent foreign government agencies concerned with intellectual property policies.

Third, the United States must accept that, in the orderly development of adequate and effective copyright protection, each society is entitled to choose a copyright system adapted to its people, values, and needs, subject only to the acceptance of international norms of justice. The United States government, however, can take two important steps to nurture, wherever necessary, an understanding of the necessity and justice of securing to all the world's authors basic economic rights which sustain the independence and productivity of creative communities:

o Support for International Training Programs

Both WIPO and UNESCO have established fellowship programs under which the copyright officials of developing countries visit developed countries and study their copyright systems and commercial practices. The United States should actively support these endeavors. The amounts of money required are small and the benefits in exchange of views, cross-education, and establishing relationships between governments and rightsholders are considerable. S. 2549 would enhance the ability of the United States to expand its development cooperation program in intellectual property and deserves prompt consideration by the Congress.

Although the announced intention of the United States to withdraw from UNESCO should not have any impact upon our membership and continued participation in the UCC, its intergovernmental committee, its substantive subcommittees, and its working groups, it may preclude a role for that agency in United States copyright development cooperation programs. For this reason, the United States should examine the feasibility and desirability of materially increasing United States financial and technical assistance to WIPO copyright assistance programs.

o Development of United States Training Programs

Apart from supporting international training, the United States should establish a unilateral copyright training program mobilizing governmental and private sector copyright expertise to deal with regional copyright law development problems. An annual copyright symposium bringing to one place legislators, administrative officials, users, and rightsholders, examining a handful of major copyright issues, would provide an unprecedented opportunity to spur modernization of copyright laws. Such symposia should complement direct intergovernmental discussion with states and regions where copyright law needs to find secure roots. In particular, the United States should focus technical legal assistance programs and symposia on the the Caribbean, Latin America, the Pacific Basin, and the Persian Gulf.

United States Adherence to the Berne Convention

It is clear that the Berne Convention is a significant forum for reconciling domestic laws within the international copyright community. Yet, the United States is not a member of the Berne Convention. It is beyond the scope of this Report to explore in great detail why this is so. With the development of the UCC, however, the sense of urgency which attached to adherence to the Berne Convention abated; and, the twenty-five year process of revising the

1909 Copyright Act placed international copyright in a secondary position, at least politically. Nonetheless, the 1976 Copyright Act was intended to bring United States copyright law more closely in accord with the current text of the Berne Convention, in order to facilitate adherence if so desired.

The question today is not whether the United States should immediately adhere to the Berne Convention, but whether possible adherence should be examined in the near term. In this respect, from the proceedings of the International Copyright Advisory Panel at the Department of State this month (September 1984), it is clear that the Administration is about to begin active consideration of adherence to the Berne Convention.

The Copyright Office believes that the close and continuous involvement of the American public and the Congress -- particularly through the House and Senate Subcommittees concerned with copyright -- in this process is essential. United States adherence to Berne probably would involve, in some important respects, reworking parts of the careful balance of domestic copyright interests embodied in the 1976 Copyright Act, which were only recently achieved with great difficulty and after significant compromises. The question, therefore, remains whether the United States is prepared, if necessary, to let international interests outweigh domestic concerns reflected in the present copyright law. In this regard, the commercial needs of United States copyright industries must be considered alongside the institutional and individual needs of American consumers, libraries, and schools. The fundamental issue, then, is the kind of copyright system the United States wishes to have and whether the Berne Convention comports with these notions of copyright justice. This is why the Congress should involve itself from the very outset

of examining adherence to the Berne Convention; considering the key questions; and functioning as one of the fora within which all concerned with copyright may seek and find where the overall public interest lies.

Elevating the Concept of "Adequate and Effective" Copyright Protection in Specific Cases

Works Distributed by Satellite Signals:

Notwithstanding the many advantages of satellite distribution systems for the delivery of programming, they carry with them the potential for considerable market disruption. While rightsholders can develop signal scrambling and encryption systems so that only authorized recipients may utilize the contents of signals, they are imperfect solutions. Deadbolt locks help deter crime, but laws punishing burglary and housebreaking still are needed. In the case of commercial signal poaching, encryption may only drive up the cost of successful piracy.

Several steps should be taken by the government to enhance protection abroad for United States copyrighted materials distributed by satellite:

- The United States should promptly ratify the Brussels Satellite Convention on the basis of existing copyright and telecommunications law. It is essential that international law recognize that unauthorized interception and distribution of program-carrying signals is illegal.

- The United States should encourage members of the UCC and Berne Conventions to examine the copyright implications, at the international and national levels, of the distribution of protected works by satellite, particularly Direct Broadcast Satellite (DBS).

- Finally, as part of diplomatic consultations on modernizing the copyright regimes in this Hemisphere, the United States should consider initiating a multilateral dialogue on the protection of program-carrying satellite signals. Among the issues which should be considered are: 1) the recognition, under the laws of American states, of public performance

rights to satellite signals intended, and unintended, for domestic viewing; 2) the rights and limitations, in the laws of American states, applicable to public distribution of satellite signals; and, 3) the responsiveness of United States film and television industries to local demand in the region for motion picture and television materials. This final issue is of special importance, because the incentive to misappropriate program-carrying signals is greatest in areas not fully, effectively, or promptly served by legitimate distributors.

Extension of International Copyright Protection for Computer Software:

As new types of authorship resulting from technological innovation materialize, legal uncertainties, piracy, other forms of infringement, and communities of interest opposed to copyright recognition, invariably interact to undercut the position of the new class of authors. History repeatedly has shown that the experience of states, and an enhanced public understanding of the judgmental, ultimately human, creativity involved in new media of expression, is usually required before copyright markets and law enforcement become routine and accepted.

Today's new important class of authors are computer programmers. Courts, rightsholders, and users, world-wide are in the midst of refining the laws and commercial practices surrounding computer software as copyrightable subject matter. The recognition that computer software is a species of creative authorship closely akin to traditional "literary works" is growing, yet doubts about the wisdom of applying traditional copyright to these "untraditional" works remain. The Copyright Office believes that these doubts, which are the product of a failure to examine at the international level how limitations as well as rights might moderate proprietary rights with user needs, are misplaced. Recognizing computer programs as copyrightable subject matter does no more than instruct courts to settle disputes over proprietary interests in works under a particular set of established legal norms.

Promoting adequate and effective protection abroad of copyrighted computer software has been the subject of government attention. In response to proposals from some states to limit copyright protection for computer software, proposals to amend domestic copyright law to impose the so-called "rule of the shorter term" have been explored in the Congress. This rule, as applied to computer software, would generally provide that the term of copyright protection in the United States could not exceed that provided for in the copyright law of the country in which the software in question originates. Whether reciprocity in rights, as well as in duration of protection, is possible and desirable also is being considered.

The Copyright Office prefers not to comment upon these ideas in detail in the absence of specific legislative proposals. Specific legislation of this sort would not, however, resolve the fundamental question of what is adequate and effective international copyright protection of computer software. Thus, regardless of whether Congress chooses to impose limitations on the protection of foreign computer software, or to otherwise encumber access to United States markets, two steps should be taken to promote expanded international recognition of copyright protection for computer software and to clarify conditions under which such protection would be considered adequate and effective:

- o Urge Multilateral Fora to Initiate Study Program on Copyright Protection for Computer Software.

  Although international considerations of computer software protection under industrial property regimes have produced the conclusion that protection for such works as literary and artistic property is preferable, neither the UCC Intergovernmental Committee nor the Berne Executive Committee has examined the particular means by which states might establish copyright regimes in this area. To fill this void, the United States should consider asking the two committees to initiate a study program to widen international understanding of how

existing copyright laws would apply to software and whether special amendments might be desirable to balance private and public interests.

o Special United States Efforts in the Pacific Basin.

While the fundamental concepts of authors' rights are not widely accepted in the Pacific Basin as a matter of social or commercial policy, states such as Singapore, South Korea, and Taiwan have a very great interest in attracting high-technology investment, particularly in the information development sector. In addition, the United States has important domestic interests in obtaining adequate and effective protection of computer software in the Pacific Basin. If new information storage, processing, and retrieval techniques are to proliferate, the manufacture of hardware (with incorporated software) to meet the demands of business, educational, and personal users must be met, at least in part, though the industrial productivity of Asia's NIC's. And levels of direct investment, licensing and, ultimately, joint venture, necessary for industrial productivity cannot be achieved without a reasonable, intellectual property investment climate.

Since, as noted earlier in this Report, the NIC's of the Pacific Basin view intellectual property issues as matters more of trade and development than of authors' rights, the burdens of persuasion, education, and negotiation of copyright related arrangements with this region will fall to United States trade officials in the overall context of trade related issues.

Measures to Assist in Evolution of Taiwanese Copyright Law

This Report has noted impediments to the adequate and effective protection of literary and artistic property in Taiwan, derived not only from a low level of exclusive rights and inadequate enforcement provisions, but also from the imposition of a fairly rigid and cumbersome registration formality as a precondition to local protection. The proposed revision of the Taiwan Copyright Act, now pending before the Legislative Yuan, would, if enacted, materially up-grade the copyright climate in Taiwan, to the benefit of indigenous and foreign copyright holders. It would not, however, resolve all of these problems.

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The copyright discussions of April, 1984, demonstrated to the Copyright Office that the government on Taiwan recognizes copyright piracy must come to an end. Taiwan has proposed a law which moves toward that objective and it hopes for the cooperation of United States copyright holders in legitimizing the valued industrial activity of local reprinter-publishers.

Like the United States itself, Taiwan's intellectual property regimes have matured along with the needs of its peoples; and the thrust of its economic development and its expanding stake in international trade and investment has been to spur local growth and prosperity. 221/

The success of the April, 1984, consultations was due, in no small part, to the quiet contacts and diplomatic efforts of the AIT and CCNAA. In order to further assist the Taiwan government in its copyright law development, United States copyright officials and private sector interests should reflect upon taking the following measures with the assistance of AIT and CCNAA.

221/ The remarks of the Director-General of Taiwan's Board of Foreign Trade, in January 1984, reflect more than a wish to soothe the feelings of an audience of United States rightsholders:

> It is not just because we realize that we cannot afford to ignore the international condemnation, that we must maintain our good standing in the international economic community to attract foreign investment, transfer of technology and international trade, it is more because we view the counterfeiting issue as the greatest hindrance to our country's launching into a new era of economic development. From a technological point of view, our country is ready to move on to a new phase of development, but we must persuade our people and our industries to look beyond their immediate concern of quick profits, and to lift their vision towards larger and lasting gains. V. Siew, "Anti-Counterfeiting Measures in the Republic of China," speech delivered at the Mid-inter Meeting of the International Anti-Counterfeiting Coalition, January, 1984, at 1.

First, the AIT can facilitate the evolutionary process in a spirit of cooperation and with technical assistance. Specifically, expert working groups could promptly be established to explore possible resolution of a few outstanding issues which would remain if and when a new copyright law is enacted in Taiwan.

Second, CCNAA and AIT should assist in establishing channels for regular commercial contact between local reprinter/publishers and foreign rights-holders. The essence of copyright is in its exercise; licensing and enforcement must, therefore, go hand-in-hand. If Taiwan is to take the considerable obligation of according foreign rightsholders the opportunity for enhanced copyright protection, then foreign rightsholders must accept Taiwanese industry as potential rightsholders with a stake in the protection of authors' rights.

Finally, while it is unrealistic to expect Taiwan to abandon completely its reliance upon copyright registration as a condition for enforcement of rights, the Copyright Office is prepared to share its expertise and experience in copyright registration rules and procedures to assist Taiwan in developing its own, and has offered to do so.

Canadian-United States Copyright Relations: A Special Challenge

One distinct set of problems surrounds maintaining adequate and effective copyright protection in industrialized states including, of course, the United States itself. What sets the United States and certain other large copyright exporters potentially at odds with other industrialized countries is the very size of their copyright exports and the seemingly inexhaustible interest other peoples have for Western popular culture. The sporadic copyright disputes

between the United States and Canada fit into this set of problems, with a curiously inappropriate political tone reminiscent of the more difficult moments of the "North-South Dialogue."

One United States-Canadian copyright problem is dealt with in S. 736. Indeed, the "border broadcasting war," which, in part, spurred consideration of S. 736, involves non-copyright laws intended to discourage Canadian businesses from placing advertising on United States border television stations which large numbers of Canadians watch and enjoy. There are a considerable number of other areas in Canadian copyright law and policy which are of direct economic interest to United States authors and entrepreneurs:

- o Canada's declining to consider adherence to the Florence Agreement, a hoped-for quid pro quo for Congress' exemption of Canada from the "manufacturing clause" of United States copyright law;
- o The presence in Canadian copyright law of their own manufacturing requirement, in the form of a compulsory license. While not resorted to with any frequency, its presence is inappropriate and troublesome to United States publishers;
- o The apparent disinclination of Canada to move to adherence of the Brussels Satellite Convention; and
- o A short list of particular questions and concerns arising out of the recently published White and Green Papers on copyright law revision.

Because of a possibility that the modified form of reciprocity proposed in S. 736 conflicts with the UCC, the question arises, how might the United States secure some equitable treatment for its copyright owners and broadcasters in Canada? There are several possibilities:

First, the Congress could choose to enact S. 736, resolving the UCC issues in favor of equity to our copyright owners. While recent developments in the consideration of the copyright aspects of cable television within the UCC and Berne Convention have not produced a consensus on all points, there does seem

to be general agreement that, for a substantial rediffusion of performances of copyrighted works beyond the area of normal reception, a right exists at least to equitable remuneration. Canada's present copyright law does not even meet this minimal standard; it is the standard essentially adopted in our law. While technical issues of the bill's compatibility with the UCC remain, Canada may arguably be now more clearly in violation of the UCC than before. And, enactment of S. 736 has not been analyzed as a possible means to redress a violation of the UCC in light of United States foreign relations law concerning redress of treaty violations, generally.

Second, there is theoretically no reason why Congress could not legislate increases in the duties applicable to particular Canadian exports to the United States.

Third, S. 2282, 98th Cong., 2d. Sess. (1984), introduced by Senator Barry Goldwater of Arizona, to limit foreign ownership of United States cable systems, could provide an economic incentive to secure more favorable treatment in Canada for United States copyright industries.

Fourth, United States-Canadian negotiations concerning the economic and regulatory integration of our telecommunications systems, freighted with economic importance to both countries, could become a forum for resolution of copyright disputes which, in fact, are made more profoundly critical by the transnational character of these telecommunications systems.

Of these possibilities, the Copyright Office is inclined to favor the fourth. The Copyright Office believes that enactment of S. 736 would be premature. An increase in duties upon selected Canadian exports to the United States is doubly problematic: first, with duties on the most important products bound, actions here to raise those duties would probably evoke

Canadian retaliation; and, second, retaliation by the United States against Canadian exports unrelated to copyright can widen other current trade difficulties with Canada.

Enactment of limitations upon the right of foreigners to own cable systems in this country would, at present, fall most directly upon a small number of Canadian entrepreneurs. Foreign ownership of media in the United States raises a host of policy questions that center around foreign influence in the "marketplace of ideas," and localism in telecommunications services. These considerations and sentiments may be so fundamental that they should not (or could not) be bargainable for equitable remuneration for the rediffusion of United States broadcasts in Canada.

The Copyright Office's preference for the fourth approach involves factors which also lead us to view enactment of S. 736 as premature. Regulatory decisions, copyright policies, non-copyright systems for regulating market opportunities in Canada for foreign works, and laws such as C-58 discriminating against United States broadcasters, are all aspects of a larger dialogue about telecommunications services in the Northern Hemisphere. An opportunity to consider broad based negotiations in these interrelated areas should be pursued.

There are other reasons for the Copyright Office's preference for quiet negotiations in a forum where Canadian officials can focus upon <u>their</u> international trading interests. First, a constant theme in Canadian copyright policy making is the tension between the desirability of adopting a high level of copyright protection to promote national authorship and entrepreneurship, and the visceral conviction that doing so would only make United States

copyright industries richer. Seeking to build reasonable copyright expectations into negotiations where Canada stands to gain introduces practical economic reciprocity into our copyright relations without doing potential violence to the UCC, or the rule of national treatment in general.

Second, Canada is a major industrialized power. Yet, by virtue of its proximity to the United States, and its relatively small population concentrated along a common border, the voices of Canadians can barely be heard over the din of American popular culture. The United States must acknowledge the reality that this causes major political and social problems for Canadians. Our own history shows the connections between copyright law, economic and cultural nationalism. Canada's great industrial power should not obscure the fact that it is still in the grip of these forces. The interest the United States has in reaching an amicable understanding with Canada on copyright matters transcends the uniqueness of Canada's position next to the United States. The concerns Canada has over United States penetration of its copyright markets is, in fact, shared by the smaller industrialized states of Western Europe. The problems the United States faces with Canada may emerge in other areas of the industrialized world. Careful persuasion, discussion, and negotiation on the basis of mutual economic interest sounds general, but it may be the best way to keep all industrialized countries firmly tied to international copyright arrangements.

This conclusion is not as desperate as it may sound. In fact, there is good reason to believe that Canadian copyright policy makers are more sensitive than before to the long-term interests of their creators in establishing a higher level of copyright law and to the importance of building foreign markets for the products of their copyright industries. Notwithstanding earlier studies which called into question the entitlement of copyright owners

to protection against cable retransmissions of program-carrying broadcasts, the current Green Paper reserves its position and calls for special study and public debate. Further, in telecommunications policy planning documents, Canada has acknowledged the need to reach contractual arrangements with United States program-suppliers for at least certain important broadcast redistribution activities. None of these developments insure a successful outcome for copyright negotiations, but they do evidence flexibility. The experiences of an increasing number of states with cable television simultaneous retransmission activities have not resolved basic copyright policy problems, but they have moved to the acknowledgement of equitable remuneration instead of absolute copyright control in some cases. This trend may make resolution of the Canadian cable controversy somewhat easier to achieve.

Finally, as Congress and the Executive work to create a climate encouraging United States-Canadian copyright negotiations, it should not be forgotten that Canada has been, still is, and hopefully will remain, the most important and profitable foreign market for many of United States copyright industries which feel most aggrieved by Canada's past copyright policies. More could be lost to domestic copyright interests in a confrontation with Canada than we can deprive their copyright owners of in this country. In the long term, regimes calculated to increase, rather than decrease, copyright royalties which Canada derives from the United States will serve our national interests, and those of our authors and copyright owners. If the United States cannot work with a friend with whom we share generally common values to solve bilateral copyright problems, we will hardly be able to solve copyright problems with societies less congenial towards the United States.

FINAL OBSERVATIONS

This Report has been requested and supplied to serve the Congress' concern about the treatment of United States copyrighted works in international commerce and in foreign markets. That concern is growing because the importance of that commerce is growing, and becoming increasingly critical to the national welfare. We have entered the information age; and "information" in this context means not only traditional copyrighted works -- books, films, music, recordings -- but telecommunications and computer technologies that carry them. Indeed, copyright in some countries now also embraces, for example, broadcasts and computer programs. Informational works and technologies have drawn the world, and its markets, closer together -- indeed, created true world markets. They have affected the content of national and regional cultures and how they define themselves. The stakes in revenues, employment, and trade balances, are huge and growing, absolutely and relatively. They are so large that Congress should avail itself of data, on a continuing basis, with which to quantify the magnitude of domestic and international commerce in copyrighted works and to discern trends.

We confront at the outset that laws which govern how authors and their works are treated are national laws. The question, therefore, is what course to follow to the end of securing in all countries an adequate level of copyright protection for United States works -- and for those of other countries as well.

This problem is now especially challenging and severe. It is not new. All countries, including our own, have formulated copyright policies and laws based upon their effect on cultural identity and vitality, and trade interests. In an age when the cultural and trade consequences are greater than ever, that scrutiny should be ever more rigorous.

So the problem of establishing international norms or standards is not new. To that end, the multilateral copyright conventions were established, and they have been erected on the twin pillars of national treatment and a minimum agreed level of "adequate and effective" protection.

What is "adequate and effective" for the Victorian era is clearly not serviceable for the space (or information) age. But the multilateral conventions provide the only source of international copyright norms and the only means for modernizing them, and are, therefore, indispensable standards of reference for any unilateral action, by any nation, in asserting, in service of its interests, what it believes to be adequate and effective. And "adequate and effective" has already been incorporated as the standard in our domestic copyright related trade laws.

This is not to say that the United States can not, and should not, use unilateral trade leverage to serve its copyright interests. It has already done so, and probably will again. And this Report has made recommendations where this might be done effectively. But the United States should carefully assess such actions for their impact upon the multilateral agreements and their organizations. They, and their principles of national treatment and adequate and effective protection, and the apparatus and opportunity they afford for change and growth, serve our interests too well to sacrifice.

To be sure, the multilateral organizations do not hold out the guarantee of success; the Third World and predominantly copyright-importing countries constitute the majority of the membership of both the UCC and the Berne Convention. But the organizations bear a tradition of elaboration of copyright protection, and they are, at a minimum, an opportunity for all countries to explore in a systematic, scholarly, and consultative way the on-going problems of modernizing copyright. For these reasons, in formulating

copyright policies and laws, and in its international initiatives, the United States should consider their international impact upon the multilateral conventions and organizations as carefully as that upon domestic commerce.

David Ladd
Register of Copyrights

Senator LEAHY. Thank you, Mr. Ladd.

I think your office has done a magnificent job of summarizing the problem. There is no question that your report will be seen as the definitive report in the future and I think the fact that it exists may, in and of itself, start some thinking. This will give all of us a chance to focus.

The theme that I found interesting in the report is the alternative approaches of bilateralism and multilateralism. It depends on who we have testifying, or which industry, or where the problem lies. I sense as I read this that you have a general preference for the multilateral solutions under the UCC, but you clearly endorse both approaches as appropriate.

Now, you named the Pacific Basin and Persian Gulf as two areas for a bilateral approach would be the best way to cut down piracy. Can you tell me why you suggested bilateral against multilateral approaches in those areas?

Mr. LADD. Because of our appraisal that the principal countries in those regions where piracy is a particular problem are the most reluctant to join the international copyright organizations and will delay joining as long as possible, and we cannot delay long in securing copyright in those regions. Even in those countries which are responding to the need for the development of copyright law, like the People's Republic of China, they have approached the international treaties and their obligations cautiously. Until such time as they are able to bring themselves to join the convention with the less demanding standards, the UCC, we must establish copyright relations with them on some basis. There has been some success in consultations with Taiwan already. Consultations with Korea are to be held within the next 2 months. Those are the kinds of countries where it is necessary to take immediate action and try to establish some kind of direct copyright relations.

Senator LEAHY. I was struck by your quote when you said these countries are long on printers and short on publishers—140 million sound recordings distributed from that region annually—140 million?

Mr. LADD. By the way, there are contrary estimates. One estimate is as low as 100 million instead of 140 million, but taking the lowest——

Senator LEAHY. It's still a staggering amount. You talk about negotiating with them in terms of trade benefits rather than push the multilateral treaties.

Do we really have the economic persuasion to introduce effective results?

Mr. LADD. Let me respond to that by talking about two efforts, one already made, and one under way.

Senator LEAHY. The reason I asked the question, I see Singapore and the main thing they have got to export is their labor. Because they control the economy and they say we are going to make recordings, we are going to make computer chips, whatever. They don't have the facilities to manufacture them, but they have the location in that area that is beneficial to them, and they have the ability to focus labor on particular things.

Where are the quid pro quos?

Mr. LADD. Let's take Singapore, because it is a good example.

In one area Singapore seems quite eager to establish copyright relations with the United States, and that is in the area of computer-related works. Singapore visualizes itself as the Switzerland of the Far East. They aspire to a high-technology economy. During consultation between representatives of the American Government and the Singapore Government in the spring of this year, in which the Copyright Office participated, it was clear that there was a certain eagerness to regularize relations between the United States and Singapore, at least in the computer field.

There was not much enthusiasm, however, about regularizing relations with respect to other copyrighted works, which are pirated in wholesale lots. There is no secret that Singapore is the main source of pirated tape recordings. There, the GSP benefits are of some relevance, but it also has to be recognized that as countries rapidly develop, they graduate from GSP standards. Thus, it would be easy to overstate the significance of GSP leverage in Singapore, but Singapore does want overall good trade relations with the United States, and it also wants the reputation of a dependable and ethical trading partner.

I have no confidential information, but I have learned from the press that Secretary of State Shultz recently personally intervened with the Prime Minister of Singapore on intellectual property with good results. In consultations with Singapore in the spring of this year, we were told that the new copyright law, which has long been under study and preparation, would be some indefinite time in coming. It now appears it may come sooner than later. The point I am making is that once the United States places intellectual property high on its agenda in trade relations with other countries, as it now has clearly done with Singapore, we tend to get positive results.

Senator LEAHY. What about a place like South Korea, where they have had animosity toward copyright? Do you just keep plugging away?

Mr. LADD. You may wish to ask the Department of State for a more expert opinion, but I think in that situation, the GSP is of

greater influence than in most other cases. A new South Korean draft copyright law has been released. They have now consented to consultations with representatives of the American Government and the American private sector in relation to their copyright law. I think that there is some prospect for progress in that country as well.

Senator LEAHY. I think in Saudi Arabia, where it is not an economic factor, it is not a poor country, saying they cannot afford a textbook, this, that and the other thing, they can afford whatever they want, that apparently is one of the major places for piracy.

Can you get them to come on line?

Mr. LADD. Whether we can or not, I don't know, but certainly there are trade relations with Saudi Arabia which allows us to introduce an intellectual property item in the overall trade agenda. I think if something was done like what has been done with Singapore, we might get a favorable response.

I would like to comment about one other aspect of the remarks you have made. It is one thing for countries to justify piracy on the basis that needed copyrighted works would in no other way become available to their population, but that is not the case in Singapore. There, the overwhelming bulk of their production goes into the export trade and finds its way to other markets, even in those markets where there are adequate copyright protections, but where policing these piratical imports is a very difficult problem.

Senator LEAHY. You mentioned earlier that we have S. 736, which concerns unauthorized retransmission of television programs originating in the United States. I have been meeting with Canadian counterparts and when Mr. Mulroney was in Washington a few months ago and we had breakfast with him, I had a discussion with him on a number of these subjects. I notice there have been official talks between our governments.

What is the status of those talks?

Mr. LEIBOWITZ. Senator Leahy, the talks have been progressing, principally under the leadership of the FCC, the NTIA, and the Department of State. At the present, given the change in government, there is an ongoing review of the implications of this change in terms of what should be the next step in negotiations on a broad range of telecommunications issues, including the cable television issue.

Senator LEAHY. There have also been communications within the Berne Convention and the UCC, and there is some consensus for remuneration for the use of broadcasts by cable companies.

I know you have expressed some reservation about the content of S. 736 and you are working to try to resolve some of those, but is it fair to say that if Canada is not clear of violations of the UCC it makes the approach of S. 736 possible?

Mr. LADD. It is more plausible today than it was before. The international organizations move by consensus. In that consensus-forming manner they try to give content, in the case of the UCC, to the phrase "adequate and effective." Both the UCC and Berne have, within the last 1½ years, addressed the question of cable television and what kind of copyright liability must attach to cable retransmissions on the basis of the treaties. While there were some areas of dispute, a consensus seems to have emerged from those

discussions that, at least when there is a cable retransmission outside the zone of direct over-the-air reception, remuneration is due to copyright owners of programming contained on those transmissions. On the basis of that consensus on what the responsibilities are under the UCC, I would say that it is more plausible than it was before.

Senator LEAHY. You also discuss the problem of computer software piracy. I was told by my 14-year-old son that the problem is I talk to too many adult experts. If I talked to more people in his age category and read Bloom County a little bit more carefully I would understand it.

Mr. LADD. Did you see the recent cartoon in the New Yorker where a wife was saying to the son, "It won't hurt you to help your father with his computer."

Senator LEAHY. Yes. We may get a couple of those in my office, and my office manager said he would be glad to have my 14-year-old come in but he is not going to have a computer in the office if there is any possibility I might ever get my hands on it.

Can you give us a little overview of what progress is being made to have software given copyright protection in the developed nations, or do your want to submit that for the record?

Mr. LADD. I can give you a brief report, and then I will turn to Lewis Flacks to give you some additional information.

First, there is clearly a trend to establish copyright as the correct and preferable mode of protecting computer software. In every country, with the possible exception of Australia which is a special case, where the question has been adjudicated, the result has been that computer programs are literary works entitled to copyright protection.

There was some argument in Australia, but that has been overcome by legislation. Second, the multilateral organizations are addressing the question, and while there is no final conclusion, there is another conference to be held next year. I believe that the new trend is to establish an international norm that computer programs should be protected by copyright. There recently have been conferences in Brazil and there have been very controversial and strenuous consultations between the United States and Japan on how computer programs should be protected. Lewis Flacks can give you a few comments on that.

Mr. FLACKS. All I would add is that agencies concerned with the international protection of computer software are now collecting information from foreign countries with regard to protection of computer software. And, what I have seen of the responses so far indicates most States recognize that copyright is the correct vehicle for protecting software—from the interest of creators of software, as well as those of good-faith competitors, users, and consumers. And, they feel that this development should be encouraged.

There is, as well, a movement to encourage the examination of copyright as applied to software by the World Intellectual Property Organization, which administers the Berne Convention. To date, the area in which this issue has been discussed is the industrial property side of WIPO; but the product of that inquiry was recognition that it would be better considered on the copyright side of WIPO.

We expect meetings on the copyright side to occur within the next year. If I had to assess the present state of legal thinking—and this is not based on direct contacts with the interests but from reading and talking with foreign copyright specialists—I would say that there is agreement that copyright protection should apply to software but relatively little shared experience with copyright. And, because of that, and the relative paucity of litigation, an exchange of views on licensing, the nature of fair use, of known and feared abuses does seem important to us. The international organizations which function largely by the exchange of information and practical experience with new copyright markets should apply considerable efforts to making an international dialog possible.

Senator LEAHY. I have another question to submit to the record.

Continuing resolution is underway, and somewhere in there is the money for your office and, incidentally, the money for my own.

I do want to emphasize again how important it is to us, the report you made, and it is one of those kinds of rare reports that have given the Congress a touchstone to work from in this area.

It is a complicated area and one that is unusual for us. I don't know if any Member of the Senate has come here with a background in this area, and so you can give us something so we can have an instant background, and I appreciate that very much.

Mr. LADD. That is very gratifying and very generous.

I am glad you commissioned us to do the job.

Senator LEAHY. Thank you.

We stand in recess at the call of the Chair.

[Whereupon the subcommittee adjourned at 3:20 p.m.]

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